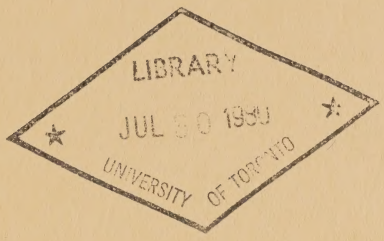
Ontario

Commission on Freedom of Information and Individual Privacy



Access to Information and Policy Making: A Comparative Study

Research Publication 16

ACCESS TO INFORMATION AND POLICY MAKING: A COMPARATIVE STUDY

by Heather Mitchell

Research Publication 16

Prepared for the
Commission on Freedom of Information
and Individual Privacy

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Ontario

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on
Freedom of Information
and
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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of government information;

3. The categories of government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 16. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn by having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The question of public access to government documents containing information pertaining to policy-making processes presents one of the more difficult issues to be considered by the Commission in responding to its terms of reference. Advocates of a more open system of government claim that greater public access to documents generated by that process -- task force reports, briefs, consultants' studies, Cabinet minutes and related documents, draft legislation and regulations, working papers, etc. -- would usefully subject this important governmental process to public scrutiny and might facilitate greater participation by the public in the development of policies affecting them. On the other hand, many who feel reservations about the adoption of freedom of information laws believe that this particular area of activity is one which might be dislocated and undermined by the enactment of a freedom of information scheme. More particularly, such observers express concern that freedom of information legislation based on American and Swedish models might conflict with important constitutional conventions of the parliamentary system, such as the doctrines of individual and collective ministerial responsibility.

A previously published research paper prepared for the Commission, Freedom of Information and the Policy-Making Process in Ontario, by Mr. John Eichmanis (Research Publication 13), presented a description of the central policy-making processes of the government of Ontario together with an account of five case studies undertaken to determine current policies and practices relating to the question of public access to documents generated by these processes. The present paper offers an additional and comparative perspective from which to examine this issue. The author, Ms. Heather Mitchell, has prepared a thorough account of the impact of the American and Swedish freedom of information schemes on policy-making processes as well as the anticipated effect of proposed schemes brought forward at the federal level in Australia.

In order to provide a basis for an informed judgment as to the relevance of Swedish and American experience to the development of a freedom of information policy in Ontario, the author has framed the discussion of information access schemes in those jurisdictions in the context of a broader discussion of the institutional framework and political traditions of the systems of government in each country. As will be seen, the author's view is that notwithstanding the significant differences in the constitutional traditions of Sweden and the United States, there are enough similarities with the political processes of parliamentary jurisdictions to permit inferences to be drawn with respect to the possible policy choices for dealing with the question of access to information related to policy-making in a freedom of information scheme for Ontario.

Ms. Mitchell, a member of the Ontario Bar, is a graduate of the Faculty of Law of the University of Toronto. She has been a member of the Commission's research staff for the past fifteen months. Prior to joining the Commission's research staff, Ms. Mitchell engaged in the practice of law and served in a research and advisory capacity for various organizations, with particular emphasis on the legal aspects of environmental protection.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. It should be emphasized, however, that the views expressed in this paper are those of the author, and that they do not necessarily represent the views of the Commission.

Particulars of other research papers which have been published to date by the Commission are to be found on page 222.

John D. McCamus
Director of Research

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CHAPTER I

INTRODUCTION

The subject of this study is the regulation of public access to information relating to the process of formulating government policy.[1] This study examines the legal mechanisms in place in Sweden and the United States which facilitate public access to policy information and suggestions. It also examines the legislative proposals recently put forward in Australia.

The purpose of granting access to material generated in the policy-making process is essentially twofold. The first is to meet the requirements of accountability a democratic society imposes. It rests on the premise that the government's performance as a policy maker

1 This study adopts the following as a workable definition of "policy":

A policy is a statement, either explicit or implicit, directed or derived, of the goals and intentions of a government, a branch of government, an agency, or some other unit or organization. Policy itself is given meaning and set into action through:

- policy actions, such as legislation;
- programs;
- projects;
- regulations, taxes and other operations of the instruments of government.

From Joseph F. Coates, "What is a public policy issue?" in Hammond, K.R., ed., Judgment and Decision in Public Policy Formation (Boulder, Colorado: Westview Press, 1978).

can only be assessed if the information underlying government policy choices is made publicly available. The second purpose is to allow people outside the government infrastructure to participate in the process. It rests on the premise that an open society is a desirable public good.

Clearly, some measure of accountability is offered if the facts underlying policy decisions are made available to the public. Indeed, in cases where a policy decision has been made, the granting of access after the fact will enable some assessment of the quality of the decision to be made. If, however, public participation in policy making is to be encouraged, then access must be granted before a decision has been made -- usually contemporaneously with each step in the policy-making process.

Of course, it is also important that the government be accountable for its administration. To ensure administrative accountability, it may be enough that only the facts concerning administration are made accessible. To ensure full accountability for policy making, however, one needs not only the facts concerning what is being done but also the proposals for action or inaction. One needs to know not only what is being done, but also what is being done inadequately or not at all, and why.

While it is generally agreed that democracy requires accountability in government, including policy making, it is also generally agreed

that the government's deliberative process must, to some extent, be shielded from publicity to protect the quality of decision making. The tension between the two interests is particularly acute when considering access during the policy-making process because, in this area, the deliberative process itself becomes the subject of accountability. Without information about policy proposals and how they were dealt with, there can be no accountability for policy making.

The three countries which are the subject of this study were chosen because they form a continuum along with practices of access to information are evolving.

Sweden is the most open. It provides the model towards which the others are moving. Sweden has had legislation on the subject since 1766.[2] The United States occupies the middle ground with its Freedom of Information Act[3] passed in 1966, and substantially amended since. Australia is the newcomer to the field. A freedom of information bill[4] was introduced by the government in 1978 but had not passed by November, 1979. The bill was based in part on previous

2 The Freedom of the Press Act, as amended; in Constitutional Documents of Sweden (Stockholm: The Swedish Riksdag: Norstedts Tryckeri, Stockholm 1975 and 1978).

3 5 U.S.C. 552.

4 Freedom of Information Bill, 1978.

government studies of the issue.[5]

Just before the government bill was introduced, a minority of the members of the Royal Commission on Australian Government Administration prepared a draft Freedom of Information Bill[6] which is referred to as the Minority Report Bill. Partly because of public pressure, the government referred its bill to the Senate Committee on Constitutional and Legal Affairs which produced a report[7] in early November, 1979, indicating that many of the Minority Report Bill's suggestions were apposite and should be adopted. At the time of writing, the government's response to the Senate report has not been announced.

It would be misleading to fixate on freedom of information laws as the only, or, indeed, the principal vehicle of openness in governmental policy processes. This study therefore examines the structure of government in each country, the requirements for openness inherent in

5 Attorney General's Department, Proposed Freedom of Information Legislation: Report of the Interdepartmental Committee (Canberra: Australian Government Publishing Service, 1974), and Parliament of the Commonwealth of Australia: Policy Proposals for Freedom of Information Legislation: Report of the Interdepartmental Committee 1976, Parliamentary Paper no. 400/1976 (Canberra: Australian Government Publishing Service, 1977).

6 Report of the Royal Commission on Australian Government Administration (Canberra: Australian Government Publishing Service, 1976).

7 Parliament of the Commonwealth of Australia: Report of the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill, 1978 and Aspects of the Archives Bill, 1978 (Canberra: Australian Government Publishing Service, 1979).

each structure, the policy-making process used to arrive at legislation and the way in which access to information as well as other laws and practices affect the process.

The legislation in all three countries provides at least the minimum for accountability, namely the facts on which policy choices are based. Both the United States and Sweden go further. Access to a large part of the deliberative process in each country is provided by requirements other than access legislation. In Sweden, the Constitution[8] requires that all policy proposals be widely circulated by the responsible minister together with background information. The minister must take any comments into account before proposing a measure to the Cabinet. The system has the virtue of making the government accountable both for its decision and for the process used to reach that decision. It also allows wide participation before any options are foreclosed.

In the United States, the Congressional hearing process makes a large amount of deliberative material available before choices are made, and at a time when meaningful participation is possible. The Government in the Sunshine Act[9] requires agencies headed by collegial bodies (of which there are a large number) to deliberate in public, and

8 Instruments of Government Act Chapter 7, Article 2 as translated in Constitutional Documents of Sweden, op.cit.

9 Pub. L. 94-409 (1976) 90 Stat. 1241.

the Federal Advisory Committees Act[10] requires advisory committees to deliberate in public.

Although access to deliberative information within the executive branch is circumscribed by an exemption in the Freedom of Information Act, the exemption lost some of its potential force when the Attorney General circulated an interpretive memorandum[11] urging agencies to release information, even if it was technically exempt under the Freedom of Information Act, unless the agency determined there would be a real harm caused by its release. The Attorney General stated that the Department of Justice would no longer defend agencies in freedom of information suits unless the agency could convince the Department of Justice some serious prejudice would result from release.

It is clear that not only freedom of information legislation but also the structure of government can have an important effect on access to information during the policy-making process. This paper examines those structures carefully, and indicates that notwithstanding the different constitutional traditions in each country, there are enough similarities with Ontario to permit inferences to be drawn about possible policy choices for Ontario.

10 Pub. L. 92-463 (1972) 86 Stat. 770.

11 Attorney General's letter of May 5, 1977 reprinted in the Congressional Record of May 17, 1977 (Daily Edition) S7763. See also Access Reports (Washington, D.C.: Plus Publications) May 17, 1977, p. 2.

A second important result of this comparative study is the light it sheds on open government practices. The following chapters are replete with examples of information withheld in one jurisdiction but available in another. The difference is usually traceable to a concern in the country which withholds that disclosure will injure an interest of the state. The experience of the country which discloses the information indicates that no harm results from disclosure. This is best illustrated by the evolution of American practices under the Freedom of Information Act. Much of what was withheld in the earlier days of the statute's implementation is now routinely disclosed without adverse impact on government interests.

As will be seen, a design for access to information in Ontario depends on the point in the continuum of openness at which the government chooses to begin. The choice may depend on which of the purposes for access predominates. If the sole purpose were to be accountability for the product of policy making, then perhaps access to factual information after a decision is made would be sufficient.

If the government is to be held accountable for failure to take initiatives, however, then access to background information must be given at all stages in the process. Further, if it is agreed that there is value in an open participative society, and that meaningful public participation in the formulation of public policy is to be encouraged, it follows that access to both facts and proposals during the policy-making process is necessary.

The structure of the Ontario government contains no parallel to mechanisms such as the Congressional hearing process in the United States or the constitutionally required consultation process in Sweden which encourage public access to the policy-making process. Accordingly, it may be argued that there is a compelling need for freedom of information legislation in Ontario to be fashioned in such a way as to ensure a similar degree of government accountability for its performance as a policy maker, and of encouragement for public participation in these processes as is found in the other democracies this study examines.

CHAPTER II

THE POLICY-MAKING PROCESS AND ACCESS TO INFORMATION IN SWEDEN

A. Introduction

The Swedish system has a number of similarities with Ontario: there is a unicameral legislature led by a Prime Minister who must enjoy its confidence or resign; a Cabinet of ministers, each of whom is the head of a subject area ministry; parliamentary oversight of government functions through question periods; standing committees; parliamentary auditors; and an Ombudsman.

There are differences, of course: for example, seats in the Swedish legislature are assigned proportionally; Cabinet ministers, although responsible to the legislature, are not responsible for implementing government programs. Program administration is left to government authorities which are independent of ministries, but which are responsible to the Cabinet as a whole. The Swedish tradition of public service requires that each minister -- and each civil servant -- be individually responsible for his or her actions.

Although the Cabinet is a collegial body, ministers who do not want to take legal or political responsibility for a decision must register their disagreement in the minutes.[1] Civil servants also must register their conflicting views if they are to escape responsibility in the event a decision is later declared erroneous.

The concept of ministerial responsibility is not seen as an impediment to access to information in Sweden. The scope of individual ministerial decision making compared to Cabinet decision making is quite narrow. It concerns the organization of the ministry and policy evaluation. It does not extend to implementing programs or decisions; this is left to the agencies.[2] It is the minister, however, and not the agency who has a discretionary power to release documents otherwise falling under the Secrecy Act.[3,4]

1 Since the 1920s only two or three disagreements have been registered. Nowadays, a minister who could not participate in the collegial decisions would be expected to resign: personal correspondence, Dr. T. Carlbom, Swedish Institute. A minister's formal legal responsibility is to Parliament, in particular to the Standing Committee on the Constitution. Political responsibility is to the Cabinet.

2 See infra, p. 16 for a discussion of this structural distinction.

3 Law on the Curtailment of the Right to Demand Official Documents, Law No. 249, May 28, 1937, as amended to Jan. 1, 1975, unpublished translation; hereafter referred to as the Secrecy Act.

4 See infra, p. 68 for a discussion of the statute; and infra, p. 76 for a discussion of its relationship to the Freedom of the Press Act.

The Freedom of the Press Act,[5] which grants every person the right of access to official documents, is more than 200 years old. It was passed at a time of great opposition to censorship; indeed, the government which passed the Act in 1766 promised to abolish censorship.

Because the Act originated as a bill to abolish censorship, its major thrust was not to provide access to official documents but rather to ensure the press's right to print whatever information it wished to. Access to official documents was provided as a concomitant necessity. Thus, the access provisions formed only one of fourteen chapters in the Freedom of the Press Act. It is therefore difficult to understand how Swedish access to information works if only the legislation is examined. This paper examines other mechanisms for providing access to information and emphasizes that the most important mechanism is the practice of openness, which has become entrenched in civil servants' behaviour after 200 years of the Freedom of the Press Act.

To illustrate the practice, the last section of this chapter traces typical steps in a policy-making process. The process traced is one which would result in legislation, but it is easy to see the stage

5 Freedom of the Press Act as amended to 1977. Official translation as found in Constitutional Documents of Sweden, Amendments to the Instruments of Government Act, The Riksdag Act, The Freedom of the Press Act Adopted by the Riksdag at its 1976/77 Ordinary Session. (Stockholm: Swedish Riksdag, Norstedts Tryckeri, 1978), hereafter cited as RA (Riksdag Act); FPA (Freedom of the Press Act); IG (Instruments of Government) and Constitutional Documents.

at which the process would end if an ordinance, regulation, directive, or other instrument not requiring parliamentary approval were the end-product.

B. Structure of Government

Sweden is a constitutional monarchy with a unicameral legislature[6] called the Riksdag. The King[7] is the head of state and, following constitutional reforms in 1969, has now only ceremonial functions.[8]

The Prime Minister is appointed by the Speaker of the Riksdag,[9] after

6 Until January 1, 1971, Sweden had a bicameral legislature. The unicameral legislature is elected by universal suffrage. There are now 349 members, 310 of whom are chosen by the Sainte Lague system of proportional representation in 28 constituencies; and 39 of whom are distributed on a national basis. A party must obtain either 4 percent of the national vote or 12 percent of the vote in a single constituency to win a seat. Cf. M.D. Hancock, Sweden: The Politics of Post Industrial Change (Hinsdale, Illinois: The Dryden Press Inc., 1972) p. 171, hereafter cited as Hancock.

7 The most powerful political party, the Social Democratic Party, advocates the abolition of the monarchy because it believes it is a political anachronism. The constitutional reforms of 1967-69 will have the effect of abolishing the monarchy when the present line dies out: Hancock, p. 184.

8 "In accordance with the principle of parliamentarianism the Head of State has no power." Constitutional Documents, op.cit., p. 13. In former times, the King appointed the Prime Minister and the Cabinet ministers, and took an active part in the Council of State. At present, the King's active role is confined to chairing the Advisory Council on Foreign Affairs, a group which is consulted about foreign policy.

9 IG 6:2.

the Speaker proposes a nominee[10] to Parliament and receives negative votes from fewer than half the members.[11] Although the leader of the party with the largest number of parliamentary seats is usually appointed,[12] such appointment is not automatic.[13]

The Prime Minister is head of the Cabinet, which consists of nineteen ministers, thirteen with portfolio, and six without,[14] each of whom is responsible to the Riksdag. Ministers are appointed by the Prime Minister.[15] They do not have to be members of the Riksdag.[16,17]

10 Before proposing someone, the Speaker must consult the Vice-Speakers and representatives of political parties with seats in the Riksdag: Constitutional Documents, p. 13.

11 IG 6:2. Members who abstain or who are absent are deemed to have cast affirmative votes. If a nominee is defeated, the Instrument of Government Act makes provisions for the process to be repeated as many as four times. If, at the end of that time no successful candidate is found, then a general election must be held. IG 6:3.

12 N. Elder, Government in Sweden: The Executive at Work. (Oxford: Pergamon Press, 1970) p. 58, hereafter cited as Elder.

13 Someone who is "capable of commanding majority support" is to be appointed: Hancock, p. 185.

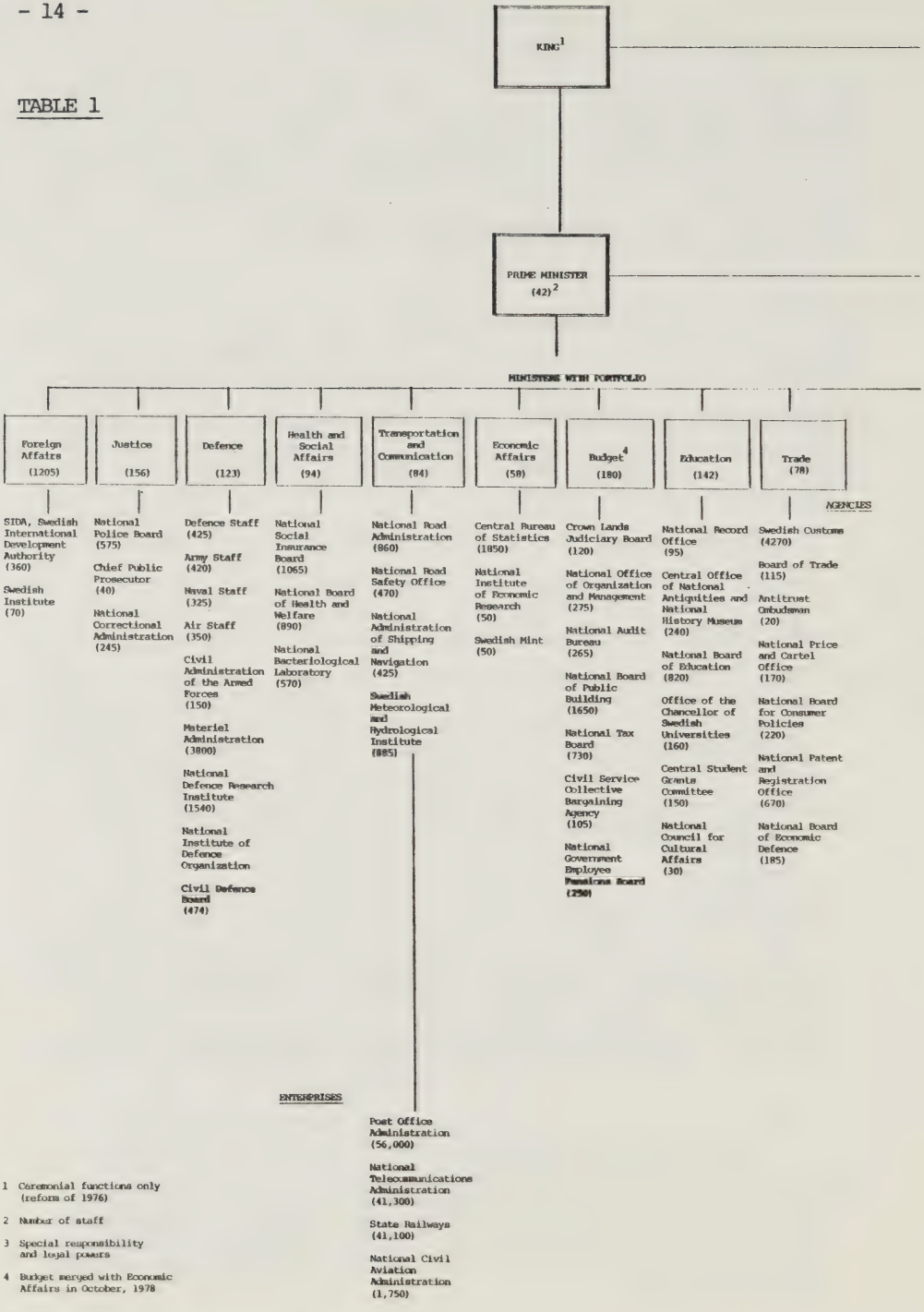
14 Vinde, P. and Petri, G., Swedish Government Administration (Second Revised Edition). (Stockholm: Bokforlaget Prisma, 1978), p. 14, hereafter cited as Vinde and Petri.

15 IG 6:1. If the Prime Minister resigns or dies, all other ministers are discharged by the Speaker: IG 6:7.

16 Elder, p. 43, although they must have been Swedish nationals for at least ten years: IG 6:9.

17 If a member of the Riksdag is appointed as a Cabinet minister, he or she leaves the Riksdag and the seat is taken by a substitute: IG 4:9. The substitute will be the person next on the party list of candidates who stood for election but who did not get elected: RA 7:4:2.

TABLE 1



1 Ceremonial functions only (reform of 1976)

2 Number of staff

3 Special responsibility and legal powers

4 Budget merged with Economic Affairs in October, 1978

PARLIAMENT
(The Riksdag)

Standing Committees

.Foreign Affairs	.Education	.Industry	.Social Insurance
.Justice	.Environmental Conservance & Agriculture	.Physical Planning & Local Government	.Cultural Affairs
.Defence		.General Legislation	.Taxation
.Social Affairs			.Finance
.Transport	.Labour		.Constitution[3]

MINISTERS WITHOUT PORTFOLIO
But With Special Responsibilities

Agriculture (98)	Housing (87)	Labour (100)	Industry (150)	Local Government (59)	Public Health	School Policy	Energy Policy

Staff Figures Not Available

AGENCIES

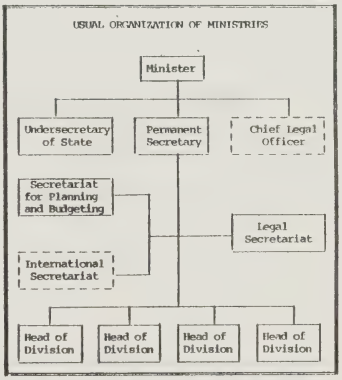
Agriculture	Housing	Labour	Industry	Local Government
National Board of Agriculture (200)	National Housing Board (155)	National Labour Market Board (805)	National Industrial Board (370)	County Administrations (9000)
National Agricultural Marketing Board (150)	National Board of Town and Country Planning (142)	National Board of Industrial Safety (360)	Geological Survey of Sweden (525)	
Central Seed Testing Institute (160)	National Land Survey Board (675)	National Immigration and Naturalization Board (185)	Board for Technical Development (145)	
National Institute for Plant Protection (110)			National Institute for Testing and Metrology (380)	
National Board of Forestry (120)				
National Board of Fisheries (160)				
National Environment Protection Board (500)				
National Food Administration (220)				

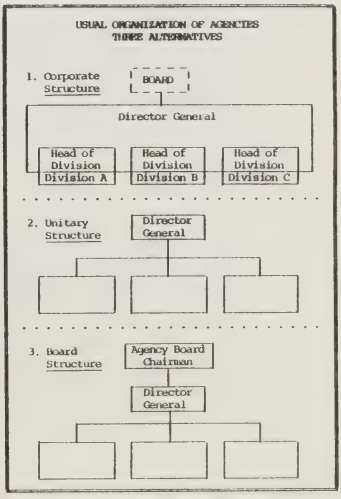
ENTERPRISES

Swedish National Industries Corporation (7,700)

Swedish Forest Service (5,800)

National Power Administration (11,150)





The Prime Minister and the Cabinet together are the Government.[18] The Social Democratic Party, first elected in 1932,[19] governed until 1976 when it was narrowly defeated on the nuclear power issue.[20] Apart from the war years and the late 1960s, the Social Democrats never had more than a majority of one in the combined upper and lower houses.[21] They were able to stay in power by forming political alliances and by adopting a compromise style of governing. As a result, consultation and compromise have also become entrenched in the Swedish administration.[22]

1. Ministries and Agencies

Ministers are assisted by small staffs[23] of civil servants[24] in

18 IG 6:1.

19 Hancock, p. 189.

20 The Social Democrats were replaced by a non-socialist coalition of the Centre Party, the Liberals and the Conservatives under Centre Party leader Torbjorn Falldin. This government resigned in October 1978 after failure to reach agreement on nuclear power policy. It was followed by a Liberal minority government under Prime Minister Ola Ullsten.

21 Hancock, p. 190.

22 D.A. Rustow, The Politics of Compromise: A Study of Parties and Cabinet Government in Sweden (Princeton: Princeton University Press, 1955) passim, hereafter cited as Rustow.

23 See Table 1 for staff figures.

24 The chief civil servant in a ministry is the Under-Secretary of (cont'd)

ministries, the chief function of which is policy-making.[25] Ministers do not implement policy or legislative programs.[26] Such work is left to civil servants in agencies.[27,28] (See Table 1 for illustrative names and organizational models.) The agencies are independent[29] of

24 (cont'd) State. He or she is appointed by the Minister and usually has the same party affiliation. If the government falls, the Under-Secretary of State is expected to resign: Vinde and Petri, p. 20. See, however, IG 11:9, "Appointments ... shall be made by the Government ... attention shall be paid only to objective factors such as service, merit and competence."

25 See infra, p. 78 for a discussion of the policy-making process and the effect of the Freedom of the Press Act.

26 Ministries do, however, promulgate "norm-setting regulations within the competence of the executive power." Kurt Holmgren, "The New Swedish Legislation on Administrative Jurisdiction" (1974) 18 Scandinavian Studies in Law 71 at p. 74, hereafter cited as Holmgren.

27 "Agency" usually means "a central administrative authority resposible directly to the Government and having a national field operation": Vinde and Petri, p. 36.

28 A distinction must be made between "government authorities" (about 200 in number) and "agencies" or "boards" (about 80 in number). All boards and agencies are "authorities" and are therefore included in the application of laws such as the Freedom of the Press Act; but some authorities, although directly responsible to the government, are not agencies. For example, the 24 County Administrations are authorities, as are specialized institutions such as medical institutions, cultural institutions, laboratories, research institutes, military staffs and public enterprise; none of these are agencies.

29 Vinde and Petri, at p. 62, note that their independence means questions cannot be asked in the Riksdag concerning particular administrative decisions. As ministers are not responsible for the agencies, they cannot be answerable for them. Elder notes at p. 45 that ministerial responsibility in the sense of being responsible for the conduct of administration within the whole area of public policy designated by a ministerial title (and as found in Canada) does not exist in Sweden. Ministers do, however, take collective responsibility for Cabinet decisions.

The Prime Minister and the Cabinet together are the Government.[18] The Social Democratic Party, first elected in 1932,[19] governed until 1976 when it was narrowly defeated on the nuclear power issue.[20] Apart from the war years and the late 1960s, the Social Democrats never had more than a majority of one in the combined upper and lower houses.[21] They were able to stay in power by forming political alliances and by adopting a compromise style of governing. As a result, consultation and compromise have also become entrenched in the Swedish administration.[22]

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corporations[37] in which the government owns an interest.[38] Share capital enterprises are not "government authorities"[39] and therefore are not subject to the same constraints,[40] such as the Freedom of the Press Act.[41]

37 Most of these companies were brought together under a holding company, National Swedish Enterprises Ltd., in 1969. In 1976, National Swedish Enterprises had 47,700 employees and a turnover of 9800 million Kr. (2.3 billion Canadian dollars at 1976 rate of exchange): Vinde and Petri, p. 50.

38 The government's shares are administered by the Ministry of Industry: Vinde and Petri, p. 50.

39 "A corporation under civil law, however, is not an authority, even if it is owned in its entirety by the state or by a municipality." Holstad, S., "Sweden" in Rowat, D. (ed.) Administrative Secrecy in Developed Countries (hereafter cited as Holstad), citing S-H Ryman and E. Holmberg, Offentlighetsprincipen och myndigheterna, sjunde uppl. (Lund, 1975) and Hakan Strömberg, Trychfrihetsrätt, fjärde uppl. (Malmo, 1973) p. 66.

40 Because share capital corporations (whether the shares are entirely government-owned or split between government and other interests) are under the civil law relating to corporations they are not subject to the same constraints as "authorities." For example, corporations are not subject to scrutiny by the Parliamentary Auditor, scrutiny by the Parliamentary Ombudsman, the Freedom of the Press Act, Riksdag financial control on wages, investments and the like; or the appeal procedures against decisions.

41 In its 1975 report, a commission investigating access to government documents (Offentlighets-och sekretesslagstiftningskommitten) (OSK) noted an increasing use of such corporations for the purpose of avoiding laws making access to government documents possible. It suggested a separate investigation to look into the matter. Statens Offentliga Utredningar (SOU) 1975: 22 English summary p. 32 (hereafter referred to as OSK Report). The recommendation has not yet been implemented: personal correspondence, U.B. Johanasson, Press Secretary, Swedish Embassy, Washington, March 14, 1979.

2. Parliamentary Committees

To help oversee the government's work, the Riksdag has established sixteen Standing Committees[42] with subject area responsibilities (see Table 1).[43] Members[44] of Standing Committees are elected[45] by the Riksdag and reflect party strength.[46] The committees prepare reports for the Riksdag evaluating both government and private members' bills and suggesting alternatives.[47] Committees do not hold public hearings[48]

42 The committees function as mediators among the various parties. The atmosphere is informal, no minutes are taken, and members, although elected for one year, are usually re-elected year after year. Thus, a certain evolution towards mutual understanding has taken place so items can be considered on their technical merits without a great deal of partisan controversy: Hancock, p. 178. Rustow, Chapter VI, passim. Contra, see Elder, who at p. 62 suggests the role of committees is simply as a useful outlet for the energies of parties spending long years in opposition.

43 There are also non-parliamentary committees such as the Foreign Affairs Advisory Council which is chaired by the King and which is to be consulted before foreign policy decisions are made: IG 10:6. Its meetings are closed: RA 8:8.

44 Only Riksdag members are eligible. Cabinet ministers are not allowed to appear before the committees unless invited.

45 Those who are to be elected are usually agreed upon by the party leaders; thus, an agreed list of candidates is put forward for election: Hancock, p. 175.

46 Small parties, for example the Communists, do not always have sufficient strength in the Riksdag to be represented on Standing Committees.

47 RA 3:7.

48 They can and do summon people to present their views and to be asked questions.

and their meetings are closed.[49] Meetings are therefore characterized by a restrained and objective atmosphere.[50]

The Riksdag cannot adopt a bill or proposition without a Committee report,[51] and a Committee cannot prevent Riksdag consideration by delaying or by failing to report.[52] Authorities other than the Prime Minister and the Cabinet are required to give information as asked for to the committees.[53]

The Standing Committee on the Constitution has special legal powers[54] which permit it to fulfil its special responsibility to examine all proposed legislative measures for possible conflicts with the Constitution. For example, it is the only Standing Committee which

49 RA 4:12. The Committee's final report is made public: Vinde and Petri, p. 61. Minutes are made public after the Committee reaches a decision, unless the Committee specifically decides otherwise: personal correspondence, Dr. T. Carlbom, Political Science lecturer, Uppsala University, August 1979. Votes in the Committee are recorded, and a member who has lost a vote can add a reservation to the report: RA 4:14.

50 Board, J.B., The Government and Politics of Sweden (Boston: Houghton Mifflin Co., 1970) p. 134, hereafter cited as Board. Cabinet Ministers were excluded from committees because it was feared they would bring partisan considerations to what were supposed to be objective discussions.

51 RA 4:4 and see Rustow, p. 183 and Board, p. 132.

52 A duty to report is imposed. RA 4:8.

53 RA 4:10.

54 IG 12:1.

can require the Government to produce even secret documents.[55]

The Committee must also examine ministers' performance of their duties and the manner in which government matters have been dealt with.[56] The Committee does so by reviewing the minutes of Cabinet meetings with the King (the King-in-Council).[57] The minutes record the items of business, the advice which each minister was supposed to have given the King,[58] and the decision.[59]

The Committee reports its findings to the Riksdag -- usually only once a year -- and the Riksdag can order the Ombudsman to bring an action for impeachment[60] against a minister, can petition the Speaker for

55 Holstad, p. 19. "Secret" documents are those so classified under the Secrecy Act. See infra, p. 68 for further discussion. The Standing Committee can, however, only require the documents pertaining to the matter which has been decided. It cannot go on a fishing expedition and require documents about other matters or matters not yet decided: personal correspondence, Dr. T. Carlbom, August 1979.

56 Constitutional Documents, p. 30.

57 Elder, p. 156. The King's presence is no longer required for Cabinet decisions.

58 Advice was recorded because ministers were under a legal duty to register their objections, if any. If an objection was not registered, each minister was legally liable for the decision together with all others who did not object: IG 7:6.

59 The King-in-Council meetings were in fact routine rubber-stamping sessions of what the Cabinet had already decided. The record of ministers' advice at such meetings was therefore fictitious: Elder, p. 156.

60 A special Court of Impeachment must be empanelled for the purpose, (cont'd)

a minister's removal, or can note a formal criticism.[61] Under the constitutional reforms of 1967-69, a Riksdag member can propose a motion of no-confidence which, if passed, will lead to Parliament's dissolution and a general election.[62]

3. Checks and Balances

a) Parliamentary Practices

The Standing Committees and the independence of the agencies are only two of several checks and balances in the Swedish system. Some will be discussed more fully below,[63] but two need only be briefly mentioned. These are questions or interpellations in the Riksdag, and the Parliamentary Auditor.

60 (cont'd) but no such action has been brought since 1854: Hancock, p. 175. In 1976 the court was abolished: RA 12:3. An action for impeachment would now be tried in the Supreme Court: personal correspondence, Dr. T. Carlbom, August 1979.

61 RA 12:4 and cf. IG 6:5. No petition has ever been brought although a vote of censure in 1929 did cause a minister to resign: Hancock, p. 175.

62 IG 12:4. Formerly the Riksdag would have to petition the King for dissolution: Hancock, p. 175.

63 Infra, p. 26 ff.

A question period modelled on the British practice was introduced to the Swedish system in 1964.[64] Formerly, questions could be asked through the Speaker at any time, but the current practice is to limit these to the question period.[65] Any member of government or opposition may ask a question.[66] Interpellations are a special form of question. They must be directed to a minister, must be in writing and must be accompanied by a reasoned argument as to why the information is necessary.[67] Before they are given to the relevant minister, the Riksdag must vote its approval.[68] The approval is a mere formality.[69] Ministers do not have to answer either kind of question, but they usually do.[70] Answers to interpellations are usually given within one month.[71]

64 Board, p. 141.

65 RA 6:2.2. They may relate only to governmental directives and policy, not to detailed cases or specific matters which are the responsibility of agencies or other authorities.

66 Hancock, p. 176.

67 IG 12:5, RA 6:1.

68 RA 6:1.

69 Hasted, E., The Parliament of Sweden (London: Hansard Society, 1957) cited by Elder, p. 165.

70 Board, p. 141. If a minister does not answer an interpellation within four weeks, he must inform the Riksdag why: RA 6:1.

71 Answers are circulated to all ministers, each of whom must approve before the answers are given to the Riksdag: Elder, p. 55. Questions and interpellations do not play as large a part in government accountability as they do in Ontario. Because the Swedish government publishes, under the Freedom of the Press Act, voluminous documentation concerning policy decisions, opposition members find little necessity to press for further details: Hancock, p. 201.

The Riksdag annually elects twelve parliamentary auditors,[72] usually from Riksdag members.[73] They are "to inspect the activities of the Central Government."[74] They can demand[75] information directly from agencies and can report, suggesting reforms, to the Riksdag at any time.[76] In appropriate cases the auditors can issue reprimands.[77]

Neither the question period nor the Parliamentary Auditor's report plays a significant part in the policy-making process. There are, however, several other checks and balances which do. These are the Ombudsman, the administrative appeals system, the constitutional requirements for consultation (remiss) before making decisions, the influence of the media, the role of special interest groups, and the use of Royal Commissions.

72 RA 8:11.

73 Board, p. 168.

74 IG 12:7.

75 Ibid.

76 Elder, p. 163. Elder cites some examples of reforms suggested by the auditors: an inquiry into provincial boundaries recommending that smaller provinces be incorporated into larger ones (1957); a costing survey of gravel roads (1964) and the undesirability of making 1 percent of the national income an absolutely rigid target for the level of aid to underdeveloped countries (1966).

77 Vinde and Petri, p. 64.

b) The Ombudsmen

Four ombudsmen are elected for a four-year term by the Riksdag[78] to investigate and report to it[79] on citizen's complaints about the authorities[80] including some aspects of the ministries.[81] The

78 IG 12:6, RA 8:10. See also The Swedish Parliamentary Ombudsman: Report for the Period January 1, 1976 to June 30, 1976 (Stockholm: Norstedts Tryckeri, 1976) p. 337.

79 The Ombudsman is the Riksdag's overseer of the authorities. The office fills a vacuum created because ministers do not directly supervise administrative agencies: Board, p. 185.

The word "ombudsman" simply means "representative," and is used in the sense of an agent who is sent to represent and to report to the principal: David Jenkins, Sweden and the Price of Progress (New York: Coward-McCann Inc. 1968) p. 97, hereafter cited as Jenkins.

80 The Ombudsman was first established in the Constitution of 1809 by those who led the coup which deposed King Gustaf IV Adolf. Among other things, there was dissatisfaction with the Chancellor of Justice's performance. He was accountable only to the Cabinet for his function of supervising the authorities. Reformers felt that "the courts and other officials would be less inclined to disregard the law in order to serve the wishes of the Cabinet if the activities of the authorities were watched by a people's tribune which was independent of the government." A. Bexelius, "The Origin, Nature and Functions of the Civil and Military Ombudsmen in Sweden," The Annals of the American Academy of Political and Social Science, 377 (May, 1968) cited by Hancock, p. 235.

81 The Ombudsman can only investigate ministries in their capacities as governmental administrative departments. The Ombudsman cannot investigate ministers' conduct which concerns ministerial decisions and responsibilities. The latter, which is considered a political responsibility for which the Minister is responsible to the Riksdag, is to be distinguished from the former, which is considered a legal and organizational responsibility subject to scrutiny not only by the Ombudsman but also by the Chancellor of Justice and the Parliamentary Auditor: personal orrespondence, Dr. T. Carlbom, August 1979.

ombudsmen have power to make recommendations,[82] not orders. Although the ombudsmen only report annually, their daily activities are followed by the media,[83] which reports both the complaints[84] and the recommendations[85] as soon as each is available.[86] Ombudsmen can attend the deliberations of any court or authority.[87] Courts, authorities and civil servants of the state or municipal governments have a duty to provide the ombudsmen with all the information and documents the latter request.[88]

82 Recommendations are invariably followed: Rowat, D.C. (ed.), The Ombudsman: Citizen's Defender (London: Allen & Unwin, 1965).

83 The Ombudsman's office provides special facilities for journalists; all correspondence is laid out every day for inspection, and recommendations are also made available as soon as they are finalized.

84 Although not required to, journalists refrain from publishing the names of those complaining: Elder, p. 179. They are also required to be "very careful" about publishing names by the 1978 agreement on a code of ethics for the media: personal correspondence, Dr. T. Carlbom, August 1979.

85 The Ombudsman has the right to be present at the deliberations of public authorities and the right of access to all information, even if secret, for purposes of investigating complaints: Halstead, p. 19. Only the complaint and the result is made public: Elder, p. 179.

86 A. Bexelius, himself a former Ombudsman, has said "The widespread circulation ... strengthens the authority of the Ombudsman vis à vis the administration." Elder, p. 178 citing Rowat, D.C. (ed.), The Ombudsman: Citizen's Defender, op.cit.

87 Ombudsmen, like the Chancellor of Justice, have the right to observe, not to participate.

88 IG 12:6.

c) Administrative Appeals

A complicated system of administrative appeals ensures that anyone who feels aggrieved by a public body's administrative decision (including the Cabinet)[89] can have the decision reviewed. The system does not allow appeals against the passivity of a public body.[90] If it does not act, it cannot be forced to do so.

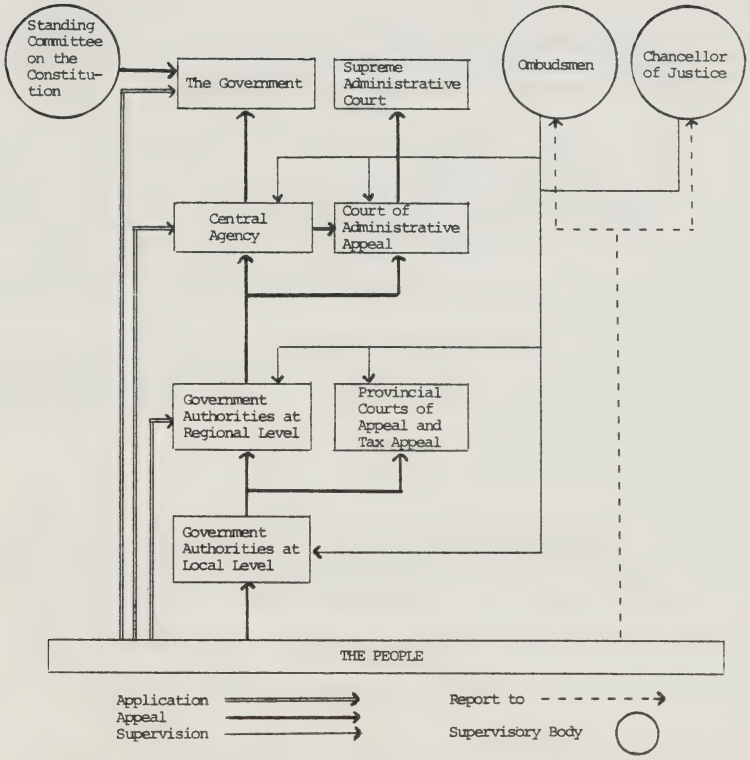
Appeals follow the government's organizational hierarchy. Each appeal is considered by the next level in the administration (see Table 2). An appellant can go to the administrative courts at any time; internal administrative remedies do not have to be exhausted first. An aggrieved person can also appeal to the Ombudsman but this office will usually intervene only when all administrative remedies have been exhausted.[91]

89 Only Cabinet decisions of an administrative (as opposed to political) nature can be reviewed. The provision for review continues the long-standing Swedish tradition that every citizen has the right to "go to the King," that is, appeal to an authority higher than the government.

90 Ragnemalm, H., "Administrative Appeal and Extraordinary Remedies in Sweden" (1976) 20 Scandinavian St. in Law 205 at p. 209, hereafter cited as Ragnemalm.

91 French, R., "Access to Government Information in Sweden," op.cit., p. 4. The Ombudsman may intervene to ask an authority to reach a quick decision but cannot take over the case or force a decision one way or another. The power is only that of reviewing the agency's independently reached decision.

TABLE 2 The Administrative Appeal System°



A person who is displeased with an authority's decision has the right to appeal to a higher authority, ultimately to the Government or to the Supreme Administrative Court. An appeal to the Supreme Administrative Court from a Court of Administrative Appeal is allowed only if the matter is considered to amount to a test case. If the case has been handled incorrectly, the matter can also be taken up by the Ombudsman or the Chancellor of Justice. The legality of government decisions is scrutinized by the Riksdag's Standing Committee on the Constitution.

° Vinde and Petri, p. 15.

In the early 1970s, two administrative procedure statutes were passed: Förvaltningslagen (FL) regulates appeals on legal issues and Förvaltningsprocesslagen (FPL) regulates appeals on administrative issues. Before these reforms, it was difficult to distinguish between internal administrative appeals and Administrative Court appeals. Sometimes Administrative Court judges were the same civil servants, serving as part-time judges, who would have considered an appeal if it had been an internal one. At present, both professional judges and lay judges serve on the Administrative Court bench. The professionals are full-time, but the lay judges[92] are part-time. They are appointed for three-year terms and usually sit as judges one day a week. Most lay judges therefore have other occupations. The Förvaltningslagen forbids a judge to hear a case in which he or she has a personal or professional interest.[93]

The procedure for both kinds of appeals is roughly similar. Only a person affected by a decision can appeal. Public interest groups do not have standing to appeal decisions. When a decision is given, it must be signed and accompanied by information about the right to appeal, the procedures for appeal, and any applicable time limit. Appeals usually must be launched within three weeks of a decision.

92 Lay judges are not to be confused with jurors.

93 Personal correspondence, Dr. T. Carlbom, August 1979.

A request for an appeal can be a very simple document; it need only be in writing, and name the person and the decision appealed from. If the appeal is to the Administrative Court[94] rather than to the next administrative level,[95] then the appellant must state the relief claimed and list the circumstances which support the claim.

If an appellant has claimed the wrong relief or has not asked for all the possible remedies, the Administrative Court will often read the additional claims into the appeal document.[96]

The background information published with the reforms in administrative appeals stresses that:

> It is important that the investigatory responsibilities of the court shall be especially used to give guidance to a party who has no representative and has shown himself to have difficulties in upholding his rights and, on the other hand, that it is essential that the direction of the case shall take place quite openly in relation to a possible counterparty. 97

94 Appeals against withholding information go to one of four regional Administrative Courts. There are about 20 such cases a year: personal correspondence, Dr. T. Carlbom, August 1979.

95 FPL s. 12. The citations in this section to FP or FPL are those given by Ragnemalm and Holmgren. English translations of these two laws are not available.

96 Courts are more likely to do this when there is no party who is adverse in interest. In an appeal against an agency decision, the courts consider that there is no adverse interest. In fact, courts can decide in an appellant's favour even when no specific relief has been claimed: FPL s. 29.

97 Ragnemalm, p. 216.

The appeal body is responsible for investigating the matter as fully "as its nature requires."[98] In these circumstances, the tribunal does much of the preparatory work which would otherwise fall to an appellant.

When an appeal is received, the appeal body notifies everyone who may have an adverse interest or who may be a counterparty. The counterparty submits an answer; the appellant can reply to that answer; and so on until the appeal body is satisfied that all the facts have been exposed. Although oral statements are allowed, the written method has been found to be faster and less expensive.

An appellant or a counterparty has a right of access to all investigatory material, not only "official documents." The party's right is considered higher[99] than the rights to withhold set out in either the Secrecy Act[100] or the Freedom of the Press Act.

> It is only in extremely exceptional cases that a case can be decided on secret material, and even then the party must in principle be informed in another way of the contents of this material. 101

98 FPL s. 8.

99 FPL s. 43; FL s. 14.

100 See infra, p. 68 for a discussion of this statute.

101 FL s. 15; FPL s. 10-12, 18.

> The appeal instance has a duty not only to produce on request the investigatory material appertaining to the matter, but also to endeavour actively to ensure that a party is informed of the contents of the material and is given the opportunity to make a statement thereon. 102

The appeal itself is limited to the matter which was decided by the previous level. No new questions can be raised but new material, including material which was available but not presented at the time of the earlier decision, can be adduced. The appeal body can inquire into the decision's suitability and reasonableness as well as its legality. Even if an appealed decision was reasonable at the time it was made, it can be overturned if new facts are adduced which would have made the decision unreasonable had the facts been presented to the previous decision-maker.

The appeal body has wide powers for granting relief. It can quash, vary, send back for reconsideration or replace the decision of a lower level, unless the appeal is from a municipality's decision. In that case, the decision can only be upheld or quashed.

Although time limits for appeal are set out in the statutes, an extraordinary remedy,[103] restitutio fatalium, is available to restore

102 Ragnemalm, p. 218.

103 An extraordinary remedy is one which is outside the normal scope of civil law remedies, i.e. monetary damages. Extraordinary remedies usually order a person to do or refrain from a named activity. Injunctions are probably the best known extraordinary remedy in Ontario.

a missed time limit. The remedy is not difficult to obtain; postal delay and being out of the country at the relevant time are good grounds, as is the failure of a decision-maker to inform a person of his or her rights to appeal.[104]

A second extraordinary remedy is called resning. It permits reopening decisions which have acquired the force of law either by statute or by lapse of time. Both decisions from which appeals are statutorily permitted and decisions from which appeals are "altogether forbidden" by some statute can be reopened in the resning process. Several cases have held that Cabinet decisions of an administrative nature can be reopened although political Cabinet decisions cannot. The distinction is this: a decision which, if it had been made by a lower authority would have been reviewable, is also reviewable if it is a Cabinet decision.

Applications for one extraordinary remedy may result in the other being granted. If there is a counterparty who may be affected, then he or she must be notified and given a chance to answer the request for review.

In deciding applications for either of the extraordinary remedies, the appeal body can grant the remedy and remit the decision to the previous decision-maker, or can alter the decision itself.

104 IG 11:1.

d) Consultation or "Remiss"

The Constitution requires:

> In preparation of government matters the authorities concerned shall be consulted with a view to obtaining the necessary information and opinions. To the extent necessary associations and private subjects shall be given an opportunity to express their views. 105

The duty to consult is usually imposed on ministers, who fulfil that duty by circulating a draft proposal to all administrative agencies, associations, and persons whom they think may be interested. Neither "necessary" nor "interested" is defined in the Constitution, but both have been broadly interpreted[106] so that very wide circulation of draft proposals occurs.

Anyone who is not included in the original distribution can get a copy of the proposal because the Freedom of the Press Act requires all documents to be publicly accessible as soon as they are sent outside an authority, such as a ministry.[107] Anyone can make comments on the proposal. The comments are usually submitted to the Riksdag with the proposal and any amendments the government has been persuaded to make.[108]

105 IG 7:2.

106 Rustow, p. 179.

107 FPA 2:7.

108 Sometimes a proposal will not be put forward at all. For example, a proposal to close liquor stores on Saturdays and on the eve of holidays in exchange for longer hours two evenings a week was (cont'd)

The remiss system is the key to understanding the openness of Swedish policy making. At this stage of the process, all the background information is available as well as the proposals for change. There is a very real opportunity to influence policy choices because at this time no commitments have been made, and therefore no options are closed. The remiss system is more important than the Freedom of the Press Act in securing both access to information and opportunities to participate in the policy-making process.

e) The Media

The Swedish media subjects the government to constant scrutiny.[109] It is able to present accurate information on both government and minority views largely because the Freedom of the Press Act makes official documents publicly available.[110] The press is particularly influential because Sweden has the highest newspaper readership rate in the world.[111] Media representatives inspect incoming and outgoing

108 (cont'd) never presented to the Riksdag because it received severe criticism on remiss: Elder, p. 148.

109 Hancock, p. 197.

110 Documents made available through the remiss system are also very important; however, the remiss system starts when the policy-making process is fairly well advanced. Therefore, access under the statute often results in more timely information for journalists.

111 United Nations, United Nations Statistical Yearbook (New York: United Nations, 1968) pp. 774-75, cited by Hancock, p. 46.

information at several ministries every day.[112] Many government institutions provide reading rooms where documents received and documents ready to be sent out are displayed every day. Often incoming documents go directly to the reading room, and journalists often see them before officials do.

f) Special Interest Organizations

There are hundreds of special interest organizations in Sweden.[113] Several commentators have concluded, based on statistical data, that Sweden is a highly organized society with a very high degree of political participation, particularly in elections.[114] These groups and organizations monitor government behaviour. Their advice during the policy-making process is treated at least as seriously as advice

112 The Swedish wire service, TT (equivalent to Canadian Press) has four or five journalists in Stockholm who do nothing else but check ministries and agencies every day for new material: personal interview, Olle Stenholm, American correspondent for Swedish Broadcasting, Washington, D.C., Jan. 16, 1979.

113 "Scarcely any other phenomenon [i.e. special interest organizations] can be said to have had greater consequences for the development of political democracy in Sweden. Above all else, what these movements gave to millions of ordinary men and women was the opportunity and the encouragement to participate in small-scale democracies. They were in fact pre-democratic schools for a democratic politics ... The high participation of Swedish citizens in politics, the disposition toward compromise ... all this and more derives in part from these movements. What is more, they have contributed a strain of genuine idealism to Swedish politics." Board, p. 42.

114 Rustow, Board and Hancock all emphasize this throughout their books.

from agencies.[115,116] At least three factors account for their high degree of influence: first, so many people belong to organizations that they represent large constituencies; second, the Freedom of the Press Act ensures that there is public oversight of present government administration; and third, the remiss system ensures that there is public participation in choosing policies for the future.[117]

Members of such special interest organizations can and do put aside their particular interest if they become members of a more formal

115 Heckscher, G., "Interest Groups in Sweden: Their Political Role," in Henry W. Ehrmann (ed.), Interest Groups on Four Continents (Pittsburgh, Pa.: University of Pittsburgh Press, 1958), cited by Hancock, p. 158.

116 There is also a wide variety of individual and collective interaction more or less continuously between Riksdag members and interest organizations. Elvander, A., Intresseorganizationerna i Dagens Sverige (Lund: Gleerup, 1966) pp. 197-221, cited by Board, p. 147.

117 Some writers, considering the North American climate for influence, argue that the ability to influence government administration or policy making is proportional to the degree of organization a special interest may have, and the size of its constituency. See, for example, M.J. Trebilcock's discussion of the lack of influence unorganized interests have, in his "Winners and Losers in the Modern Regulatory State: Must the Consumer Always Lose?" 13 Osgoode Hall L.J. 619. Other writers argue that the amount of information about government policy a special interest has is the key to the amount of influence the organization may have. For example, Anthony Downs argues that a government will only pay attention to interest groups if the government considers that interest groups know enough about government policies to perceive their effect and therefore may respond by voting for an opposition party. Where citizens do not have access to such information, the government will be likely not to consider their views: A. Downs, An Economic Theory of Democracy (New York: Harper & Row, 1957) passim.

consultative mechanism, such as a Commission of Inquiry. Commission members are independent; they do not receive instructions from their associations. Through services on commissions, a spirit of compromise and accommodation is developed.[118]

g) Royal Commissions

Royal Commissions or Commissions of Inquiry are often used in the policy-making process to investigate problems and to suggest reforms. Commissions are the central actors[119] in Swedish policy making: in any given year there will be about 200 underway.[120] If an issue is not complex, a one-person Commission may be established.[121] A Commissioner may be a senior civil servant who devotes only part of his or her time to Commission work. For complicated or time-consuming matters, full-time Commissioners chosen to balance the range of interests on which

118 Hancock, p. 157.

119 The Commissions do not make government policy decisions; however, because they prepare research, evaluate alternatives and make recommendations, they are able to channel government and public thinking on an issue. Elder notes that the use of commissions is partly a reflection of the Swedish readiness to make civil servants individually responsible for their advice: Elder, p. 132.

120 In 1976 the full-time staff of all Commissions was about 300, and the part-time staff about 3,000: Vinde and Petri, p. 24.

121 Some commissions may be appointed by the minister within whose area the subject matter falls: Board, p. 146.

the Commission's work will touch[122,123] are likely to be appointed.[124]

Commissions are used as consensus-building mechanisms[125] as much as investigatory mechanisms.[126] The watchword of Royal Commissions is thoroughness.[127] If it takes ten years to canvass all points of view, to undertake research and to make precise recommendations, then a Commission will take ten years.[128,129] Painstaking consideration of

122 This may include civil servants, academics, Riksdag members and special interest group members: Rustow, p. 179. Since 1900, "representatives of political parties and interest associations have been allocated an average of more than 50 per cent of commission memberships." Hancock, p. 203.

123 "The reception given to the Commission's final report may hinge on the importance of the groups represented and the prestige of the individual members." Board, p. 146.

124 Commissions of this kind are appointed by the Cabinet: Board, p. 146.

125 Commissions provide non-government groups highly effective leverage in decision making processes: Hancock, p. 204.

126 They are, however, only consultative mechanisms, not negotiating mechanisms. Eckstein distinguishes between the two: "Negotiations take place when a governmental body makes a decision hinging upon the actual approval of organizations interested in it, giving the organizations a veto over the decision; consultations occur when the views of the organizations are solicited and taken into account but not considered to be in any sense decisive." Pressure Group Politics (Stanford, Calif.: Stanford University Press, 1960) p. 23, quoted by Hancock, p. 156.

127 See, for example, Board, p. 144.

128 The commission on the relationship between the established (Lutheran) church and the state started its work in 1958 and continued for ten years, producing eleven reports totalling 3,000 pages. The commission to investigate the concentration of ownership in the private sector worked for seven years; the Commission on nationalization sat for seventeen years: Elder, p. 134.

129 Sometimes commissions will be transferred into permanent advisory (cont'd)

policy options is considered necessary to minimize error and to maximize the potential for making a correct choice.[130]

h) Structural Interrelationships

Open government in Sweden is assured both by the structural mechanisms described in this section and by the Freedom of the Press Act, which will be discussed in the next section of this paper. A Swedish citizen has so many avenues to follow in pursuit[131] of government information, and so many opportunities to participate in the policy-making process, that not only the climate but also the practice of openness is assured. The climate is particularly important, of course, as it means that each civil servant is so used to granting access to information, and is so used to having almost immediate accountability to the public by reason

129 (cont'd) bodies which are given fresh instructions as they complete each report. Making permanent bodies of commissions instead of setting up a new agency avoids the need for parliamentary approval. Agency budgets must be approved by Parliament, but commission budgets need only be approved by Cabinet under an existing Standing Order: personal interview, Mats Berquist, Political Counsellor, Swedish Embassy, Washington, D.C., January 16, 1979.

130 The commission's report is subject to the remiss system. "A commission's final report is usually accepted by the government as the basis for its own policy proposal in parliament." Hancock, p. 156.

131 Indeed, no pursuit may be necessary; the government may well seek out the citizen's opinion during the remiss stage of policy making.

of being personally responsible for the actions (about which he or she must give information or documents), that a habit of disclosure has developed.

This development has been gently assisted by the Ombudsman and by the imperative orders of administrative courts. It is sometimes only necessary for the Ombudsman to ask a Minister a question such as "Do you think your indexes are being kept satisfactorily?" to initiate a prompt change in unsatisfactory record keeping.

The media are quick to protest if access to documents is denied. It was in fact media intervention with the Ombudsman which led to the accepted (but not codified) standard twenty-four hour time limit for replies.[132,133]

But perhaps the greatest push towards entrenching openness comes from the remiss requirements in the Constitution. Most information is made available at this time, which is early enough to allow participation in the process. As far as major policy making is concerned, any unauthorized withholding can endure for only a short time; the information will be disclosed on remiss. It has been said that

132 This example was given by Dr. T. Carlbom, personal correspondence, August 1979.

133 Ibid. and personal interview, Olle Stenholm, Swedish National Broadcasting System, Washington, D.C., January 1979.

information delayed is information denied, but in this case, the delay does not foreclose the purpose for which the information is desired.

Indeed, in talking with Swedish officials and Swedish journalists, one is struck by the difference in attitudes between them and Canadian or Ontario civil servants or journalists. When Swedish officials are told of the amount and kind of information which is kept confidential in Ontario, they invariably reply in surprise, "Why?" Furthermore, when one asks about examples of civil servant chicanery (such as occurred in the United States when civil servants defeated the statute by delay, giving illegible copies, lying about the existence of information, and the like) one is met with astonishment. Such behaviour, if it exists at all in Sweden, exists rarely. The difference in attitude accounts for it.

When one enquires about all the ways around the Swedish legislation which might be used if an identical statute were passed in Ontario, such as the lack of time limits, the lack of a duty to disclose, the lack of published indexes, the lack of fee schedules etc., one is told that this simply doesn't happen. The legislation is not read with an eye to sliding through inadvertent loopholes; rather, it is read and implemented following its spirit of greatest openness.

Apart from the structural mechanism described in this section, there are two laws, the Freedom of the Press Act and the Secrecy Act, which deal precisely with the issues of disclosure and withholding. They

have been briefly mentioned in the text, and in the next section they will be considered more fully.

C. The Law

1. Introduction

Laws and regulations are arranged in a hierarchical system, according to the way in which changes can be made. Three Fundamental Laws form the Constitution: The Instrument of Government Act, the Act of Succession, and the Freedom of the Press Act.[134] These can only be amended after two majority votes in the Riksdag, one before and one after a general election.[135] In this way, the chance that a fad might cause a change in the Fundamental Laws is minimized and the public can respond to a proposed amendment through the election process.

Other laws can be passed or amended after a majority of the Riksdag has voted in favour of the change once.[136]

134 Until 1975, the Riksdag Act was also part of the Constitution. Constitutional Documents, p. 11 and p. 31, and see IG 8:16.

135 IG 8:15.

136 IG 4: passim.

There are several other instruments which have the force of law[137] although they are not considered by the Riksdag. For example, ordinances which set out details of how a statute is to be implemented are approved by the Cabinet. Some instruments, such as standing orders for each authority's organization and procedures, need only be approved by the authority they govern. All such instruments are authorized by delegations of power[138] by the Riksdag or the Constitution to the Government or to an authority. The Government can sub-delegate, but the authority cannot. The three Fundamental Laws, other laws, ordinances, regulations and standing orders are published in various codes of statutes.[139]

2. Laws Affecting Access to Information

The two most important laws are the Freedom of the Press Act, Chapter 2[140] of which grants every Swedish citizen the right to see official documents, and the Law on the Curtailment of the Right to Demand

137 That is, they are binding on administrative authorities and individuals, and they are universally applicable.

138 See, for example, IG 8:13.

139 These include the Swedish Code of Statutes, the Riksdag Code of Statutes, the Central Government Authorities Code of Statutes, and the County codes of statutes, which also contain municipal regulations.

140 "On the Public Character of Official Documents."

Official Documents (known as the Secrecy Act) which enumerates the kinds of information which can be kept secret.

In addition, there are various decrees and regulations such as the Decree of Service to the Public[141] which set out rules for implementing the two laws.

a) The Freedom of the Press Act

1) Introduction

The Act contains fourteen chapters divided into sections. Only Chapter 2, "On the Public Character of Official Documents," concerns access to government legislation. The others concern the media's right to carry on their functions without censorship.

The way in which the legislation is drafted differs substantially from the style of a North American statute. For example, some of the access provisions can only be understood if one refers to other chapters in the statute,[142] to the other Fundamental Laws, to ordinary statutes,

141 See Holstad, p. 3.

142 For example, while Chapter 2, Section 1 states that "Every Swedish citizen ..." has a right of access, Chapter 14, Section 5 states that foreigners are to be treated equally with Swedish citizens.

such as the Secrecy Act, and to ordinances, such as the Decree on Service to the Public.[143]

The Freedom of the Press Act enumerates rights of access, but does not impose duties to provide access.[144] There are no provisions regarding time limits or copying fees. Judicial review is not mentioned, although it is available under two separate statutes[145] which apply to all government decisions.

Although there are quite specific provisions which allow withholding information, these are not mandatory, as the Cabinet is elsewhere given an overriding discretion to release any information over which it has authority.[146]

The differences between the Swedish statute and a North American one may appear substantive, but they are in fact stylistic. Although the

143 This ordinance is directed to civil servants. It sets out guidelines for their work, including instructions to facilitate requests for information.

144 Elder, passim, emphasizes the long Swedish tradition of civil servants' loyalty and dedication to implementing laws as fully as possible. Perhaps a long enumeration of duties is therefore unnecessary.

145 The two statutes, one for appeals on legal issues, the other for appeals on administrative issues, are discussed infra, p. 30 ff.

146 FPA 2:2, para. 3. The Riksdag, Riksdag committees and the Ombudsman are not under Cabinet authority, they are under Riksdag authority. They equally have a discretion to release information which they might otherwise be permitted to withhold.

Swedish statute does not contain many of the provisions which would be essential for an effective North American access statute, it is clear[147] that in Sweden the spirit of openness is honoured. Civil servants simply do not take advantage of the loopholes the Freedom of the Press Act seems, to a North American reader, to create.

2) The Access Provisions: Chapter 2 "On the Public Character of Official Documents"

i) Purpose

The purpose of Chapter 2 of the Freedom of the Press Act is "to further free interchange of opinions and enlightenment of the public ...."[148] This statement must be read in conjunction with another constitutional right granted by the Instrument of Government Act, "the freedom of information: the freedom to obtain and receive information and otherwise to acquaint oneself with the statement of others ...."[149]

To emphasize the importance of freedom of information and the consequent necessity for the widest possible access to information, both the

147 See references to commentaries and interviews throughout this paper.

148 FPA 2:1.

149 IG 2:1.

Freedom of the Press Act and the Secrecy Act[150] authorize discretionary release of information even though it may fall within one of the exemptions enumerated in either of the two statutes.

The language reflects the philosophy of fundamental freedoms set out in the Instrument of Government Act.[151] It states that freedom of expression and freedom of information may only be restricted on certain narrow grounds.[152] In judging what restrictions are necessary, "particular regard shall be paid to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters."[153]

ii) Who has Access

"Every Swedish national shall have free access to official documents";[154]

150 FPA 2:2, para. 3 and, for example, sections 6, 9 and 13 of the Secrecy Act.

151 IG 2:13.

152 "On account of the safety of the Realm, the national economy, public order and security, the integrity of the individual, the sanctity of privacy, or the prevention and prosecution of crime ... the freedom of expression or the freedom of information may otherwise be restricted only where particularly important reasons so warrant."

153 IG 2:13.

154 FPA 2:1.

however, foreigners are treated equally with Swedish citizens.[155]

Although the term "Swedish nationals" does not include corporations, everyone connected with a corporation has an individual right of access. Equally, a civil servant in one government authority can use his or her individual right of access to get information from another authority. Government authorities do not have special rights of access. If information is exempt from disclosure, then neither an individual nor an authority can have access regardless of the purpose for which the authority may think access necessary.[156]

Special rights of access are given to the Ombudsman, to the Standing Committee on the Constitution, and to parties in a case.[157] Each can call for the production of any official document regardless of whether access has been restricted under the Freedom of the Press Act or the Secrecy Act.

155 FPA 14:5.

156 For example, a few years ago, the police, in course of a criminal investigation, requested access from the Central Bureau of Statistics (SCB) to documents containing unaggregated information about certain households. The SCB refused, saying that they had collected the information under a secrecy pledge to the households. The police appealed to the Government and then to the court. The Government upheld the SCB decision. The court agreed, and acquitted the SCB on a charge of withholding documents relevant to a criminal investigation: personal correspondence, Dr. T. Carlbom, August 1979.

157 See infra, p. 32.

iii) Time Limits

Documents applied for are to be made available "immediately" or "as soon as possible."[158] The statute does not contain any regulations about the time within which an authority must reply, or produce a document. The accepted period is twenty-four hours.[159]

iv) Where Information Must be Made Available

Unless an authority has a document solely for the purpose of technical processing or technical storage,[160] the requested document must be produced "at the place where it is kept."[161] However, if making it available there would cause "considerable difficulties,"[162] or if an applicant can get a copy in his or her own neighbourhood,[163] then it does not have to be made available "at the place where it is kept."

158 FPA 2:12.

159 Personal interview, Olle Stenholm, Washington Correspondent, Swedish National Broadcasting Corporation, January 16, 1979. The Ombudsman, in reports to the Riksdag, has accepted a 24 hour delay. Anything longer requires a very good excuse: personal correspondence, Dr. T. Carlbom, August 1979.

160 FPA 2:10.

161 FPA 2:12.

162 Ibid.

163 Ibid.

Applications, however, must be made to the authority where the document is kept.[164]

v) Fees

In general, documents are to be produced "free of charge"[165] and transcripts or copies can be given to an applicant "for a fixed fee."[166] The statute implies that each authority can fix its own fees, but the commentaries do not indicate that unreasonable fees have been charged in Sweden; indeed, it is rare that fees are charged at all.[167]

vi) Who Must Provide Access

All government authorities,[168] including municipalities, must provide access to official documents in their possession or accessible to them.

164 FPA 2:14.

165 FPA 2:12.

166 FPA 2:13. The official fee is 3 SKr. or 82 Canadian cents a page (at January 1980).

167 Personal correspondence, Dr. T. Carlbom, August 1979.

168 See infra, p. 17 ff for a discussion of what constitutes a government authority.

The duty to provide access devolves on civil servants personally, because each is legally responsible for his or her decisions. Under the 1976-77 amendments to the Constitution, a civil servant may come under a second kind of legal responsibility. The amended Instruments of Government Act provides that the Government may promulgate regulations on issues such as the "prohibition against revealing matters which a person has acquired knowledge of in public service or while carrying out national compulsory service."[169] As at August 30, 1979, the Government had not issued such regulations.[170] There are other possible penalties, however, in both the Freedom of the Press Act, Chapter 7, and the Criminal Code.[171]

The Riksdag is not a government authority and neither are the courts. The Riksdag is responsible for access to its own documents. Committee reports are made public as soon as a decision is made.[172] The courts,

169 IG 8:7.

170 Personal correspondence, Dr. T. Carlbom, August 1979.

171 Such a case first has to be tried in court according to the special provisions in the Freedom of the Press Act -- trial by jury, etc. Upon conviction, penalties are imposed according to the Criminal Code. Chapter 20 of the Code deals with "Misuse of Authority." Paragraph 3 states that a person who improperly passes on oral information can be sentenced -- unless other special statutes regulate otherwise -- to a fine or to imprisonment not exceeding one year. A new law on the secrecy of oral communications has not yet been proclaimed: personal correspondence, Dr. T. Carlbom, August 1979.

172 Committee reports which contain classified material are not made available automatically.

although independent, are "supervised" by the Chancellor of Justice who has investigatory powers similar to that of the Ombudsman. The Chancellor is both the Chief Legal Officer as well as Chief Supervisor of Legal Administration. He or she cannot interfere in court deliberations but has a right to be present at those deliberations. The Chancellor cannot be refused access to any document he or she requests from any authority lower in the hierarchy than the Government. The citizen has access to court documents after a decision is reached. The court can classify documents under the Secrecy Act.

vii) Information to Which Access Must be Given

The right of access is restricted to "official documents."[173] "Document" is defined to include not only written material and pictures, but also "any recording which can be read, listened to, or otherwise apprehended only by means of technical aids."[174] For automatic data processing material "document" means anything which is "at the disposal of the authorities."[175] This means, for example, that an authority cannot evade the access law by contracting with a share capital corporation (which is not an "authority") for storage of information.[176]

173 FPA 2:1.

174 FPA 2:3.

175 FPA 2:3, para. 2.

176 Holsted, p. 8.

To be "official" a document must be: (a) kept by a public authority, and (b) received by, or (c) prepared by, or (d) drawn up by, an authority.[177]

"Kept" means "normally in the keeping of an authority,"[178] therefore an authority would have to produce an official document even if the document had been taken home by one of the civil servants.[179]

"Received" means when a document has arrived at an authority or is in the hands of a competent official.[180] However, an exception is made for competitive entries or tenders or other documents which must be delivered in sealed envelopes. They are not deemed to have been "received" until the time fixed for their opening.[181] A document addressed personally to a civil servant at a government authority is not "received" by that authority unless it refers to a case or any

177 FPA 2:3.

178 Holstad, p. 8.

179 In some cases, however, civil servants have avoided the provisions of the Act by having material sent directly to their home addresses marked "personal": personal interview, Rolf Erichs, Deputy Chief Editor, Kvallsposten, Malmo, New York City, Jan. 18, 1979. While at the time such a practice was of only questionable legality, under the amendments it is clearly against the law, which declares that the document is considered to have been received when it is in the hands of "a competent official." FPA 2:6.

180 FPA 2:6.

181 Ibid.

other matter which rests with that authority.[182] If, however, such a letter referred both to personal matters and matters which concerned the authority, that part of the document which referred to the authority would have to be made available.[183]

Official documents which are circulated as part of inter-ministerial consultations or inter-agency consultations are in some cases not considered "received." Official documents circulated among ministries are not "received," as the ministries together are considered one entity. Protection for documents circulated among other entities is more limited. If the bodies, agencies or public authorities are associated, then the documents are not "received." If, however, they "act as independent entities in relation to one another,"[184] then the official document will fall within the definition of "received" and must be made accessible.

The word "prepared" is not defined in the Act. From the context of other sections, however, it is likely that it was included to meet the situation where an authority assembled information which had been drawn up by others and used it internally for decision making.

182 FPA 2:4.

183 FPA 2:12 sets out a general provision concerning severability of information which, if it were by itself, would be considered an official document, and information which, if by itself, would not be so considered.

184 FPA 2:8.

"Drawn up," on the other hand, is defined.[185] A document is "drawn up" only when it is "finished"[186] so that an authority can complete a decision or a report without undue interference. If a document is "dispatched,"[187] then it is deemed to have been "drawn up." Documents which are not sent outside the authority which prepares them are deemed to have been "drawn up" when the matter to which the document relates has been finally settled. If there is no specific matter to which a document relates, then for the purposes of access it will be "drawn up" when it has been checked and approved by the authority or when it has been completed in some other way.[188]

Preliminary outlines and drafts will not be considered "drawn up" until taken by an authority for the purpose of being filed.[189] Notes which contain factual information of importance for a decision, such as what someone says during a conversation with an official of an authority, must be kept and filed. They are then accessible.[190] The exception for preparatory memoranda and preliminary drafts merely codifies a

185 FPA 2:7.

186 Holsted, p. 8.

187 FPA 2:7.

188 Ibid.

189 FPA 2:9.

190 Supreme Administrative Court decision, RÅ 1971 ref. 23, cited by Holsted, at p. 11.

Supreme Administrative Court decision of 1963.[191]

The Act contains a general exception for documents prepared "exclusively for the purpose of preparation or oral presentation of a case or matter"[192] but there is nothing to prevent an authority from giving access to this material.

The Act therefore makes all official documents accessible when they are sent outside the authority or when they have been finished within the authority. Preliminary notes and discussions are not available until a decision or judgment has been made or a matter settled, and such preliminary notes remain unavailable unless they are taken by the authority for the purpose of being filed. There is a duty to file material.

It is possible therefore to exclude preliminary material from access by not sending it to the files. It is also possible to avoid access by claiming that a matter has not been completed. However, the constitutional requirement of consultation among authorities before decisions are made means that it is difficult to keep such information from falling within the definition of "official document." At most, an authority could delay access by not sending material to the file or

191 Supreme Administrative Court decision, RÅ 1963 ref. 16, cited by Holsted, at p. 11.

192 FPA 2:9.

by claiming the document was not completed. The authority would then run a high risk of being censured by the Ombudsman.

viii) Exemptions

There are permissive exemptions[193] throughout the access law. The two major sections which deal with exceptions are article 2, which gives a right to restrict access to official documents for an enumerated list of reasons, and article 11, which lists documents which are not to be considered official documents.

Article 2 states that

> the right to have access to official documents may be restricted only if restrictions are necessary considering:
>
> 1. The security of the Realm or its relations to a foreign state or to an international organization,
> 2. The central financial policy, the monetary policy, or the foreign exchange policy of the Realm,
> 3. The activities of a public authority for the purpose of inspection, control or other supervision,
> 4. The interests of prevention or prosecution of crime,
> 5. The economic interests of the State or the communities,
> 6. The protection of the personal integrity or the economic condition of individuals,
> 7. The interest of preserving animal or plant species.

193 FPA 2:3, 6, 7, 8, 9, 13.

Restrictions imposed for these reasons must be "scrupulously specified"[194] in the provisions of a "specific act,"[195] which may also authorize the release the official documents which might otherwise fall within the specific act's restrictions.

Article 11 states:

> The following documents shall not be considered to be official documents:
>
> 1. Letters, telegrams, or other such documents which have been delivered to or drawn up by a public authority solely for the purpose of forwarding a communication;
>
> 2. Announcements or other documents which have been delivered to or drawn up by a public authority solely for the purpose of their publication in a periodical which is published under the auspices of the authority;
>
> 3. Printed matter, sound or picture recordings or other documents which form part of a library or which have been furnished to the public archives by a private subject solely for the purpose of storage and custody or for

194 FPA 2:2.

195 The act is the Secrecy Act. Under paragraphs 4, 7, 21, 26, 27 and 32 of the Secrecy Act the Government has issued rules to restrict access in the following decrees:

(kg = kungorelse, trans: administrative decree)

Kg 1939:7 re civil administration

Kg 1939:835, 1977:114 re supplies and economic defence in war or danger of war

Kg 1940:204 re customs

Kg 1949:616 re civil defence

Kg 1950:462 re defence

Kg 1960:119 re psychological defence

Kg 1962:200 re military signal system protection

Kg 1975:327 re military map secrecy

research or study purposes as well as private letters, publications, or recordings which have otherwise been handed over to a public authority solely for such purposes as those referred to above;

4. Recordings of the contents of such documents as referred to in sub-paragraph (3) if such recording is kept by a public authority where the original document would not be considered to be an official document. 196

There are other permissive exemptions scattered throughout the statute.

Briefly summarized, they are as follows:

a) inter-agency communication if the agencies are not independent of each other; 197

b) documents which an authority has solely for the purpose of technical processing or storage; 198

c) recordings which form part of a register of persons which would allow the person to be identified; 199

d) tender documents or others which are required to be delivered in sealed envelopes do not have to be made available until the date fixed for opening the envelopes; 200

e) preparatory information unless it is taken care of for the purpose of being filed; such preparatory information includes preliminary outlines for decisions and communications, unless they are filed; 201

f) minutes of Riksdag committees, the General Church Assembly, the parliamentary auditor, local authorities

196 FPA 2:11.

197 FPA 2:8.

198 FPA 2:6.

199 FPA 2:3.

200 FPA 2:6.

201 FPA 2:9.

or government commissions, where the information is dealt with by the authority "solely for the purpose of preparing the matter for decision"; 202

g) copies of maps, drawings, pictures and recordings do not have to be provided if this would create difficulty for the authority and if the documents themselves can be made available where they are kept. 203

ix) Classification

There is a suggestion of a possible classification system in both the Secrecy Act and in the Freedom of the Press Act.[204] Both acts allow a civil servant to note on a document his or her opinion that the document is subject to an exemption.[205] This opinion is not binding on any subsequent civil servant who receives the document. It merely serves to alert others that someone has considered the issue and has reached a certain opinion.[206] Any official who subsequently receives the document must make his or her own decision if a request for access is received. In a few cases, when material is of "utmost importance

202 FPA 2:7.

203 FPA 2:13.

204 FPA 2:16.

205 Civil servants usually use a rectangular handstamp headed "secret." It retains other blanks which must be filled in, showing (a) the relevant paragraph of the Secrecy Act, (b) the date of classification, and (c) the name and authority of the official using the stamp.

206 Holsted, p. 25.

to the security of the realm,"[207] it is mandatory to stamp it "strictly classified." Usually only the ministries of Justice, Defence and Foreign Affairs can use this classification. The decision whether to make the document public stays with the Ministry making the classification. A "strictly classified" mark binds lower authorities.[208]

x) Procedure

An applicant who wants a document applies for it at the place where it is kept.[209] An applicant is assisted in determining whether a document exists, where it is and whether it is an official document, because there is a duty to keep indexes, diaries and registries of documents and incoming mail up-to-date.[210] Some ministries and agencies provide a room in which all documents received or ready to be sent are set out each day for anyone who wants to look at them.[211]

An application can be made in writing, in person or by telephone. Information is usually given in the same manner in which it is asked

207 FPA 2:14.

208 Secrecy Act, s. 40.

209 FPA 2:14.

210 The Decree on Service to the Public, cited by Holsted, p. 25.

211 Anderson, S.V., "Public Access to Government Files in Sweden" (1973) 21, American J. Comp. L. 419.

for although the law only confers rights of access to "official documents," not to oral information. An applicant does not have to show any identification or give any reason for wanting or needing access. If the document falls under one of the exemptions, the government may release it with conditions. For example, an exempt document might only be released to a Swedish citizen who had some need to know the information.

An authority which receives a request must "examine and determine" the request.[212] The authority has only to examine two questions: (1) Is what is requested a "document"? and (2) Is it "official"? If the answer to both is yes, then the document must be made available.[213]

If the answer to either question is no, or is uncertain, then the authority has several choices. It may refuse to provide the document, provide it with conditions, or refer the request elsewhere for decision. If the document is "strictly classified" the authority must refer it forthwith to the classifying ministry for a decision.[214]

In any event, the practice is for the authority to decide the matter

212 FPA 2:14.

213 FPA 2:2 allows restrictions to be placed on access (see infra, p. 59.

214 FPA 2:14.

promptly, usually on the same day on which a request is received.[215]

If the authority decides to release the document, then it must be produced "in such a manner that it can be read, listened to, or otherwise apprehended."[216] There are provisions for the severability of that part which is not an "official document"[217] and a provision that an applicant can obtain a copy for a fixed fee.[218]

If the authority refuses to release the document, then the applicant can appeal. If the official who has refused is the minister, then an appeal lies to the Cabinet.[219] There are provisions for intra-authority appeals in other laws.[220] After administrative reconsideration, appeals against refusals go to the Administrative Court, and ultimately to the Supreme Administrative Court.[221] Details on appeal procedures are left to another statute by the Freedom of the Press

215 There are no time limits in the statute itself but the Ombudsman has occasionally dealt with the prompt handling of requests in his Annual Report. He has found delays of up to twenty-four hours acceptable: personal correspondence, Dr. T. Carlbom, August 1979.

216 FPA 2:12.

217 Ibid.

218 FPA 2:13.

219 FPA 2:15.

220 Vinde and Petri, passim, and see Table 2.

221 FPA 2:15.

Act,[222] as are appeals from refusals of Riksdag agencies.[223] Appeals are to "be considered and determined promptly."[224]

There are no provisions for applications to enjoin the government from releasing official documents.[225] However, the Ombudsman has said that an appeal could be based on the illegality of granting access,[226] but not on the basis of preventing apprehended personal harm. As a corollary, there are no provisions requiring notice that certain information is about to be released.

There are no provisions in the Freedom of the Press Act about a court inspecting the documents in question on appeal. The courts, however, have a general right to compel production of information, notwithstanding that it may be protected from public release under a decree or law. Members of the Court pledge to keep matters before the Court secret. Neither the Government nor any other authority has ever tried to refuse a court, the Ombudsman or the Chancellor of Justice access, even to

222 Ibid.

223 Ibid.

224 Ibid.

225 Holsted, p. 26. Privacy provisions in other statutes may act as a check on release of personal information. See, generally, M. Brown, B. Billingsley and R. Shamai, Privacy and Personal Data Protection (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 15, 1980).

226 JO 1971, p. 333, cited by Holsted, p. 26.

strictly classified material.[227] The Government must abide by a court's ruling that access be given to documents. If, on the other hand, the court upholds a decision to withhold information then the Government can exercise its right to make the document public.[228]

There appears to be a gap in coverage under the Freedom of the Press Act and the Secrecy Act. Both statutes cover "official documents," but do not mention "information." Thus their exemptions have been interpreted as not applying to information which is given orally.

Although a civil servant might be censured for giving exempt information orally, he or she must first be found. Finding the civil servant is impossible if the information is given to a journalist, as the Freedom of the Press Act provides a shield.[229] No journalist can be asked the source of his or her information.

A new law on oral secrecy has been discussed, but has not yet been published.[230] The proposals are very controversial because they collide with the broader rights to information as well as journalists' rights of free access to sources.[231]

227 Personal correspondence, Dr. T. Carlbom, August 1979.

228 Ibid.

229 FPA 3:4.

230 Regulations have been circulated. Provisional law 1977:1035.

231 Personal correspondence, Dr. T. Carlbom, August 1979.

Under the new Instruments of Government Act the Government can prevent civil servants revealing information they had learned in their capacities as civil servants.[232] Such provisions could not be established by administrative decree;[233] they would need Riksdag approval.

Administrative decrees have, on the other hand, been used to simplify and to facilitate public access. For example, the "Service Circular" and the "General Instructions to Agencies" regulate office hours for public access and urge agencies to answer requests on the telephone whenever that is easier for the caller.

b) The Secrecy Act

The Secrecy Act is the major statement of what may be kept secret.[234] Forty-three detailed sections set out the kinds of records and documents which may be kept secret; the ways in which secrecy provisions may continue to govern documents through many possible uses; and the length of time for which each document may be withheld. The time limits vary according to the kind of information protected. All provisions are permissive. Information which might cause an invasion of personal

232 IG 8:7.

233 Personal correspondence, Dr. T. Carlbom, August 1979.

234 FPA 2:11 lists kinds of documents which are deemed not to be "official documents." They are therefore not accessible.

privacy may be protected for as long as seventy years; high policy information such as national security information as long as fifty years; more routine matters such as investigatory files for as long as twenty years; and Cabinet decisions between two and fifty years.

By imposing time limits, the Act provides an automatic release system. Usually, a minimum and/or maximum period for secrecy is set out in each section. The Cabinet or the authority concerned can then set a withholding period within those limits.

The Act contains an overriding discretion to release information:

> Where it is found necessary in the interest of the public or individuals, the Government may decree the release of documents regardless of what has otherwise been enacted in this Act. 235

The first four sections of the statute can be used to protect high policy information concerning defence, foreign relations, Cabinet decisions, internal security and preparedness for war for as long as fifty years.[236] These four sections set the style of the Act. Notwithstanding the subsequent enumeration of category after category of documents and their various time limits, the Act clearly states that nothing need be kept secret if the relevant entity (Cabinet, agency,

235 Section 38.

236 See Table 3, which shows the various kinds of information which can be protected and the time limits and conditions for release.

TABLE 3

Type of Document	Time Period
1. Foreign powers and national defence	. up to 50 years
2. Cabinet records	. 2 to 50 years
3. Closed sessions of the Riksdag	. up to 50 years
4. Constitutional Committee documents relating to government security	. not before the records themselves are released
5. Documents publication of which might damage the defence or endanger the security of Sweden (22 examples)	. up to 50 years
6. General economic defence preparedness (5 examples) if publication would harm defence, the economy or imperil security	. up to 50 years
7. Communication security service	. up to 50 years
8. Logbooks kept on state or municipal vessels after a collision	. until a public investigation or up to 5 years
9. Documents concerning legal disputes	. not until the case is decided or up to 20 years
10. Documents concerning investigations, inspections or psychological tests	. not until the investigation, inspection or test takes place
11. Repealed	
12. Investigation reports, experiments, scientific or technical tests	. up to 20 years
13. Police, customs or public prosecutors work (exception: the Parliamentary Ombudsman)	. not to be released if there is reasonable ground to fear that release would prevent the detection of crime or be injurious to the safety of the Kingdom or an individual and if so, up to 70 years
14. Information in the general register of criminals	. according to the law setting up the register
15. Punishments inflicted on Swedish subjects by court decision	. not unless the government decrees release
16. Penal institution and labour institution information about inmates	. up to 70 years
17. Information concerning probation	. up to 70 years
18. Criminal custody, juvenile prison internment and supervision board information (exception: board decisions separately issued or recorded	. up to 70 years
19. Security of government buildings	. up to 70 years

Type of Document	Time Period
20. Information about individuals in church registers, census rolls and assessment books	. 70 years or with the individual's permission
21. Personal information recorded in a personal register as defined in the Act on Data Registers	. not if there is reason to believe it will be used for automatic data processing contrary to the Act
22. Personal information recorded in a personal register which is to be used with data processing abroad	. not without permission by the Data Inspection Board
23. Dialectological and ethnological information obtained for research purposes	. 70 years unless individual gives permission
24. Medical information, psychological information, disablement and rehabilitation information, determination of sex information, public health, medicare, social security, support at childbirth, community child care, protection of juveniles, family advisory service, rights to purchase alsoholic beverages, temperance activities, national insurance and occupational injury insurance activities, relief activities, information on aliens who reside in Sweden and who have applied for admission	. 70 years unless the individual consents (Exception: 1) family relief if it is certain that no abuse will take place [concerning invasion of privacy], 2) information may not be released even if it is within the Regulations if someone's personal safety would be jeopardized, 3) section not to apply to decisions issued or entered in the records unless they concern child care, temperance, determinations of sex, venereal disease, abortions, sterilizations or castrations)
25. Information in municipal social registers	. not to a greater extent than in the Social Register Act

Type of Document	Time Period
25a. Documents at the Foreign Office, embassies or consulates containing personal information about officials	. 70 years unless consent
26. [Official] Guardian, economic information	. up to 20 years
26a. Information on individuals wanting to buy tenant [state subsidized] houses	. 20 years unless consent
27. Identifiable information collected for statistical purposes	. up to 20 years unless consent
28. Tax information (with 5 specified examples)	. up to 20 years unless consent
29. Information concerning supervision of banks and financial establishments	. up to 20 years
29a. Documents concerning the central finance and monetary policies of the country	
30. Documents received or prepared by the Data Inspection Board which concern personal circumstances	. up to 70 years unless it is certain no abuse of privacy will take place
31. Information concerning safety in the workplace (with 8 examples)	. up to 20 years unless the owner consents or unless it is certain that no abuse will take place
32. Information concerning the protection of workers, working hours and work permits	. up to 20 years unless consent (Reservations can be placed on the use of this information if released before 20 years)
33. Documents received under the Act on Compulsory Statements concerning Price and Competitions or by the Court for Free Enterprise or by the Ombudsman for free enterprise matters	. 20 years
34. Register of Cartels	. 20 years if the government so decrees, otherwise not protected. Petitions to prevent release allowed
35. Information from tradesmen under the Act on the duty to give information in certain questions of planning	. 20 years or with the individual's permission
36. Documents received or prepared by the Poison Information Centre which contain information concerning the manufacture or contents of the product	. not until it is certain release will not be to the detriment of the manufacturer

Type of Document	Time Period
37. Information on investigation, supervision or support activities concerning business activities (5 examples)	. 20 years to the extent that the information if released would be to the detriment of the person or business named
38. Documents referred to in the Act on Measures to Further Employment	. 20 years unless certain there will be no abuse
39. Price and contract information concerning shipbuilding contracts	. 10 years unless permission of contracting party is given
40. Documents on patent applications	. until a patent is granted unless consent
41. Applications for registration of designs	. if applicant requests secrecy, then is not released without applicant's permission
42. Documents under the Act on Arbitration in Labour Disputes	. 20 years if so ordered by the authority dealing with the matter
43. Documents on public employment exchange	. 20 years unless certain there will be no abuse (Exception: if information is required for the proper operation of the employment exchange)
44. Documents concerning moving government employees during relocation	. to the extent they contain economic or personal information, up to 70 years unless consent
45. Documents concerning legal aid	. 70 years or with consent
46. Applications to become lawyers and disciplinary proceedings	. up to 70 years (exception: decisions are not to be kept secret)
47. Information concerning accountants	. same as for lawyers
48. Documents concerning collection or communication of information on behalf of private persons	. not unless the government orders release
49. Documents concerning communications and customs	. 20 years unless consent of person identified. Reservations may be placed on release
50. Documents received or prepared by the postal or telegraph department containing information on specific pieces of mail, telegrams, telephone calls	. released only to senders or addressees

Type of Document	Time Period
51. Information on individual relations with a bank or postal chequing service	. 20 years unless consent
52. Information confidential under the Bank of Sweden Act	. 50 years unless consent from the Bank Board, the Riksdag Committee of Finance or the parliamentary auditors
53. Other information concerning the lending of funds	. up to 20 years if the government so decrees (exception: decisions to grant loans are not to be kept secret)
54. Tender information and negotiating information	. not until negotiations concluded or tender date occurs (exceptions: authority may decree such information stating conditions in concluded agreements to be kept secret up to 20 years; however, when the agreement concerns transportation or delivery of electric power, gas, water, etc., or the sale of merchandise traded commercially by authorities up to 2 years; if the authority is a government commercial department - up to 5 years)
55. Competitive information of a government enterprise in competition with other enterprises	. up to 20 years if the government so decrees
56. Information for use in negotiations of collective agreements and employment conditions	. up to 5 years or until a decision has been made or negotiations have been terminated
57. Information for the Nobel Prize Committee	. not without permission of the Committee
58. Minutes and records of a case tried behind closed court doors	. until the case is decided (exception: court can decide that records should be sealed for up to 70 years)

board) decides otherwise, or if the individual identified in the information gives his or her consent.[237]

For some kinds of information, secrecy is required by the Act but the relevant entity can opt out of those provisions altogether. For other kinds of information, the relevant entity must pass a decree opting in to the secrecy provisions.[238]

If the relevant entity decides to release information before the expiry of the maximum time limit, it can impose conditions on the recipient.[239] In all cases, the decision-making is to be guided by considerations of the possible harm or detriment which might result if information is released. For example:

> [Information] must not be released unless it can be considered a certainty — taking into account the purpose for which release is required and other circumstances -- that the release will not be abused to the detriment of [the person or enterprise concerned]. Necessary reservations should be made on release. [240]

Although the Act permits government entities to keep many kinds of information secret, they cannot withhold records of decisions except

237 A statement to this effect is found in nearly every section. Sections 7, 9 and 13 are good examples.

238 Section 12, para. 3 is an example.

239 For example, see s. 13.

240 This quote is from section 20b and is typical of many sections found in the Secrecy Act.

in highly personal circumstances such as determinations of sex, abortions, castrations and the like.[241]

When the state is, through a government enterprise, involved in a business which competes with others in the private sector, it is protected from unfair competition and allowed to withhold the same kinds of information as its business competitors do.[242]

The Secrecy Act contains two general exceptions: the first concerns any matter which is before the Riksdag[243] and the second concerns parties involved in a case before a tribunal.[244] Unless the Riksdag's session is closed or unless there is a secret trial, information presented to the Riksdag or used in a trial must not be kept from the public in the case of the Riksdag, and from the parties in a case before a tribunal.

c) Interrelation of the Access and Secrecy Statutes

Together the Freedom of the Press Act and the Secrecy Act operate to ensure that confidentiality and openness are examined over and over

241 s. 14.

242 s. 34a.

243 s. 40.

244 s. 39.

again. Because the Freedom of the Press Act imposes a duty to make information accessible, and because most sections of the Secrecy Act contain both the permission to withhold and the permission to release, officials must consider each request afresh, thus keeping the access issue constantly alive.

Officials cannot rely on withholding as a safer decision because they are personally responsible for their decisions and do not relish being unfavourably mentioned in the Ombudsman's report.[245] Each must therefore make a careful determination and be able to justify it on appeal to a court or to the Ombudsman. On the other hand, if information is released contrary to law, a penalty can be imposed.[246]

Constant scrutiny is the core of the Swedish system.

> The genius of the Swedish system of regulating public access to government documents lies in its careful manipulation of the burden of moving forward and the burden of proof. The presumption of openness and the requirement that the custodial official make a prompt determination on each individual application results in an incremental concertization in which proper issues are considered by proper persons at proper times.
>
> Indeed the greatest virtue of the Swedish system of openness is that it forces the issue of secrecy to be continuously deliberated at successive declining levels of generality by successive declining ranks of officialdom. 247

245 David Jenkins, Sweden and the Price of Progress (New York: Coward-McCann Inc., 1968). There is no other penalty for wrongfully withholding. A court decision might censure a civil servant but the matter would end there.

246 Section 41, Secrecy Act.

247 Anderson, S.V., "Access to Public Documents in Sweden" op.cit.

D. The Policy-Making Process

The first two sections of this paper described the structure of the Swedish system, and the laws which affect access to information. This section will integrate the two by describing how the policy-making process works. Each step in the process is described. An indication is given whether the information used or produced at that step would be publicly available. The steps do not refer to any specific policy initiative as it has not been possible to put together illustrative case studies from the material available in English.

The most important influence in making information available is not the access law. Rather, it is the tradition and philosophy of openness which is found at all levels of government. As a result of the openness philosophy,

> From the standpoint of breadth of participation in formulating legislative policy, there are few countries which even approach Sweden. Virtually every major political force in the country will have had an opportunity to express its opinion often at a very early stage in the process. 248

Participants in the policy-making process include both those who participate as part of the government structure and those who participate independently. Civil servants in agencies, civil servants in ministries, ministers, the Cabinet, the Standing Committees and the Riksdag are

248 Board, p. 143.

part of the government structure; the Ombudsman, the administrative courts, the interest groups, the Royal Commissions and the media, are independent. Those who participate as part of the government structure usually do so in a chronological and hierarchical order; whereas the independent participants can intervene at any time. The media, interest groups and the Ombudsman[249] can do so on their own initiative whereas Royal Commissions and the administrative courts must wait for a request either from the Government or from a citizen.

Any person may suggest a policy initiative[250] although the process often[251] begins following a Government proposition, a private member's motion[252] or a report from a Standing Committee.[253] A proposition or private member's motion may be put forward as a result of a citizen's

249 See annual reports of the Ombudsman for examples of investigation undertaken on the Ombudsman's initiative. (Stockholm: Norsteds Tryckeri, annual) passim.

250 Many interest groups have active memberships which try to initiate policy changes. First among these is the membership of the political parties at the local, regional and central level. Trade union groups and other popular movements have more or less constant initiatives underway.

251 Strictly speaking, the ministries are small policy-making bodies and are by function the prime initiators of policy: Hancock, p. 206.

252 These are not usually in the form of a bill; they are more likely to be in petition form, and may simply call on the government to establish a Royal Commission into some matter. They may result in a future government-sponsored bill: Board, p. 144.

253 RA 3:7. "A committee has the right to present proposals to the Riksdag on matters within its jurisdiction."

suggestion to his or her Riksdag member.[254]

Agencies are rarely the source of policy proposals. Their role is more likely to be as a provider of background information[255] or as the identifier of problems which may be solved by a policy initiative.[256] After an initiative has been formulated, agencies also act as commentators during the remiss or consultation stage of policy-making.

Regardless of origin, once formulated, an initiative will be presented to the Riksdag as a motion concerning the substance of the policy initiative or as a motion asking the government to appoint a Royal Commission to inquire into the substance. If the motion concerns substance then it is either briefly debated in the Riksdag or tabled and referred to the Standing Committee with subject area responsibility.

The text of all motions and the ensuing debate are publicly available because the Constitution requires that all proceedings in parliament be open. Transcripts of all proceedings are made. Documents introduced

254 One commentator estimates that demands from public authorities make up the largest group of requests for policy investigations while "the wishes of the Riksdag, of the interest organizations, and of private individuals each constitute about one fifth of the total." Hans Meijer, "Bureaucracy and Policy Formulation in Sweden," Scandinavian Political Studies 4, (New York: Columbia University Press, 1969) p. 104, cited by Hancock, p. 203.

255 Hancock, p. 206.

256 Agencies are expected to keep abreast of developments in their field and make suggestions for reforms: Elder, p. 132.

are attached to the appropriate transcript or are published at the same time under separate cover.

If the original motion is referred to a Standing Committee, it will be only briefly considered. The Standing Committee can propose an alternative to the motion it examines; any such alternative is considered a new policy initiative and the process starts over. Usually, however, at this preliminary stage, the Standing Committee will recommend the establishment of a commission of inquiry.

Standing Committee meetings are closed, and neither transcripts of proceedings nor minutes are kept. Committee deliberations are therefore never available. But a Committee's conclusions, including the views of members who don't agree with the majority, are available because a Committee must report to the Riksdag on every matter referred to it. The report becomes public as soon as it is tabled.

In the rare case where an agency is preparing a suggestion for policy, it will do so after internal discussions, and perhaps internal research. The agency will make a decision about the proposal's form and content. Records of internal discussions and research may never be available as they may never become "official documents."[257,258] Although there is

257 See however, the Ombudsman's recommendation that relevant information on which even recommendations (not only decisions) are based should be recorded, and therefore accessible. The Swedish Parliamentary Ombudsmen, 1976, op.cit.

258 See discussion of when information becomes an "official document" supra, p. 54 ff.

a general statute on archival material, each agency has its own instructions about which otherwise unofficial documents must be recorded, filed and made accessible.

The next step is the agency's informing the relevant ministry of its suggestion. The communication, if recorded, will be available at the ministry as soon as it is received.[259] If the communication is oral then it will never be available, because "official document" applies only to information with a physical manifestation. There is no requirement for officials to keep telephone logs and there is no requirement that oral communications be recorded. There is, however, a guideline which indicates that the files and archives should be extensive enough for a possible judicial review of administrative action.[260]

If the proposal concerns a minor matter, the ministry may set up an internal committee to investigate and report. The committee meetings are closed, minutes are not always taken, and research which may be produced may be considered incomplete and therefore not accessible. Once a decision based on the research is made, then the research,[261]

259 The authority with physical possession has the duty to make an "official document" available.

260 Personal correspondence, Dr. T. Carlbom, August 1979.

261 Research by outside consultants becomes available as soon as it is received, internal research as soon as a decision is made.

the decision and any report must be filed. Upon filing it becomes accessible.

Having prepared an evaluation of the proposal the ministry informs the minister and the minister informally seeks the opinion of his Cabinet colleagues by raising the matter orally at the daily Cabinet luncheon. If he or she thinks more formal consultation is warranted a report is sent to the other ministers. The report is an inter-ministry communication and is not accessible unless one of the ministers exercises his or her discretion to make it available.[262]

If the policy proposal is a complex one then the minister will suggest the Cabinet decide to appoint a Royal Commission. Cabinet decisions are made at formal weekly Cabinet meetings, which are closed. Minutes are taken and decisions recorded.

Cabinet minutes may be protected from public access for two to fifty years under the Secrecy Act, but they are usually made public immediately.[263] Cabinet minutes are not, however, protected from access by the Standing Committee on the Constitution.[264] A Cabinet decision is available as soon as it is recorded. The decision is only

262 A minister would not do so without the permission of the authorizing minister.

263 Personal correspondence, Dr. T. Carlbom, August 1979.

264 See p. 21 ff, infra.

legally binding when recorded and made public. A decision concerning a legislative rather than an administrative matter is usually tabled in the Riksdag.

In sum, then, regardless of who the initiator is or which route is followed all paths lead to the appointment of a Royal Commission. The Cabinet appoints the members after consultation with the party leaders in the Riksdag. The consultations are informal and no records are kept; although the names of the Commissioners are announced as soon as agreement is reached. The terms of reference are published as soon as they are decided upon.

All agencies are required to provide information to Commissioners when asked.[265] The information becomes an "official document" when sent to the Commission and is therefore accessible. Commission procedures seem quite informal. Although public hearings are not held, the process of gathering information and researching ensures that every interest is consulted in some fashion.

Commissions produce large amounts of information;[266] statistics, data analyses, discussion papers, etc. This information is accessible while the Commission is working only if the Commission exercises its

265 The General Statute for Agencies requires every agency to aid other authorities upon demand.

266 Elder, p. 134.

discretion to make it available. Publication is frequent.[267] Indeed, there are so many Commission publications in Sweden that they are published in a special series of government volumes.[268]

A Commission's final report will contain recommendations and, sometimes, a draft statute. The report is submitted to the Ministry which appointed the Commission. Once received the reports are available at the ministry. In a rare case (such as an inquiry regarding espionage) parts of a report might be withheld under the Secrecy Act.

The ministry will then start the remiss procedure.[269] The ministry sends the Commission's report to all ministries, agencies, interest groups and other who might have even a remote interest in the subject matter. Each is asked to comment within a stated time. Public authorities are required to comment, others are invited. Comments are sent to the ministry and are available as soon as received.

The ministry collates the comments, makes its own deliberations and

267 Once investigations result in agreed proposals there is a general tendency to make them public: personal correspondence, Dr. T. Carlbom, August 1979.

268 The series is called Statens Offentliga Utredningar (SOU) or Government Public Inquiries.

269 Remiss is mandatory (IG 7:2). If the report is to be used for policy-making, the minister can decide to discontinue the whole process and there will then be no remiss procedure. The Constitution also allows for consultative referenda: IG 8:4.

prepares a speech for the minister to make at a Cabinet meeting. Usually the speech contains the substance of a draft bill based on the report and subsequent comments. The ministry's summaries, deliberations and draft bills are not accessible at this stage.

The minister presents the draft bill directly to Cabinet or refers it to the Law Council (if the minister does not refer it to the Law Council, the Cabinet will). The Law Council is an advisory body composed of senior judges from the Supreme Court and the administrative courts (in a three-to-one ratio). It must be consulted when a draft bill affects the civil code or criminal law and it may be consulted about other bills.

The Council gives a signed advisory opinion to the minister or the Cabinet. The opinion is confined to the proposed statute's congruence with or effect on existing legislation. It does not concern the merits of the policy proposed. Meetings of the Council are closed and minutes are not taken. The Council's opinion is accessible as soon as it is completed.

Following the Law Council's advice, the minister presents an amended draft to Cabinet. Cabinet decides whether to proceed or to wait. If the matter is very controversial or if during the remiss procedures strong opposition is shown, the Cabinet is likely to decide to wait until a more propitious time to introduce the bill.

A decision to wait may be announced in the Riksdag if, for example, a request is made during question period. As most Commissions are considered of an administrative nature, there is no obligation to announce a decision to wait to the Riksdag.

The Minister, having received Cabinet approval, introduces a bill[270] in the Riksdag.[271] It is usually tabled (although brief debate at this stage is possible) and referred to the Standing Committee with subject area responsibility. It may also be referred to the Standing Committee on the Constitution, which has a responsibility to see that bills do not infringe the Constitution's Fundamental Laws.

The introductory speech, the text of the bill, the motion to refer and the vote are all available in the transcript of Riksdag proceedings.[272]

Standing Committee meetings are closed. There are no public hearings although the Committee can ask civil servants to appear and answer questions. No minutes are taken of the deliberations.

270 The bill must be accompanied by the Cabinet minutes on the matter, by an account of the earlier consideration, by a statement of reasons and by the opinion of the Law Council, if available: RA 3:1.

271 Riksdag sessions are public: RA 2:3:1; and there is a public gallery: RA 2:4. If the security of the realm is at stake, the session can take place "behind closed doors": RA 2:4. If a session is closed then members and officials are forbidden to disclose without authorization what has occurred: RA 2:4 para. 2.

272 RA 2:16.

The Standing Committee's role is to mediate among conflicting political positions so as to reach a consensus which will endure.

> A policy can last only if it does not divide the community into winners and losers, if it embodies a standard of justice acknowledged by all sides. Any evaluation must account not only for the conditions under which a decision comes about but also for the future situation to which it applies. 273

The Standing Committee makes a report to the Riksdag and the bill is read a second time. It is rare that changes are made at second reading, since the leading factions will have reached the necessary compromises at the Standing Committee meetings.

The Standing Committee's report is available when tabled in the Riksdag. If amendments are made then the bill is returned to the Standing Committee for further consideration and a further report. The bill is read a third time and is voted upon, the result is recorded and the bill is sent to the Prime Minister[274] for formal signature and proclamation. The proclamation and the formal text are published in the Swedish Statute Book.

From this brief outline, it is easy to see that the spirit, not the letter, of the access law is an important part of the policy-making process. It is rare that a request has to be made under the access

273 Rustow, p. 232.

274 IG 7:7. Before the constitutional reforms, the King signed the bills.

law during the policy-making process; rather, access to information is so fundamentally a part of the Swedish system that information is made available without requests being made.

The Swedish administrative structure is largely responsible for the climate of openness. Because ministries and agencies are separate entities, the rule that documents become available as soon as sent outside the originating entity means that hardly any document can move from one level to another without becoming public.

For the purpose of monitoring or influencing the policy-making process, the availability of information is probably most important during the remiss stage, that is, when all studies have been done, and one set of recommendations has been prepared. Information at this stage of policy making is available under the Instruments of Government Act,[275] not the Freedom of the Press Act.

In sum, then, the Freedom of the Press Act is rarely used during the policy-making process. If it is, it is likely to be at a very early stage when individuals who want to make policy suggestions need background information. Practices and laws other than the Freedom of the Press Act ensure that at all these stages each of the participants has full information for the task.

275 IG 7:2.

E. Conclusion

The process of policy making in Sweden is more open and the influence of non-governmental participants greater than it is in Ontario. This is so not because the Freedom of the Press Act is used to get information during the various stages of policy-making, but because the spirit of the law, that openness is the rule, is observed. At each fresh step in the process (with the exception of Minister-Cabinet interaction) the information used in the previous step is made available. The habit of openness ensures that each participant has access to information.

The Freedom of the Press Act is therefore more effective in providing access to information about the government's day-to-day administration than it is in providing access to information in the policy-making process. As the stated purpose of the Freedom of the Press Act is to make the government accountable for its administration, it is not surprising that the Act is practically unnecessary during the policy-making process.

To achieve a comparable degree of openness in Ontario, an access statute would have a much broader scope that the Swedish Freedom of the Press Act. It would have to include provisions for mechanisms similar to those used in Sweden but which are not found in the Freedom of the Press Act. These include the requirement for circulating documents before making decisions, the wide use of investigating bodies such as Royal Commissions, the habit of following the Ombudsman's recommendations, independent administrative appeals, and the like.

CHAPTER III

THE UNITED STATES

The United States is a constitutional, federal republic with a bicameral legislature. The government structure was established in 1776 after a successful revolution against the British. The Constitution was drafted to prevent a reoccurence of policies which, under the British, had led to dissatisfaction and finally revolt. Thus the Constitution provides that certain fundamental rights and freedoms are beyond the power of the Legislature alone to amend;[1] and further, that the government's authority is drawn directly from the people, who are sovereign.

The Constitution also divides power between the states and the federal government. Although many states have enacted freedom of information legislation,[2] this paper will examine only the federal system.

1 Changes can only be made after a two-thirds majority vote and ratification by states.

2 Wallis McClain, ed., A Summary of Freedom of Information and Privacy Laws in the 50 States (Washington, D.C.: Plus Publications, 1978).

A. The Structure of the Federal Government

As the colonists thought they were oppressed by the unresponsive centralized (and sometimes despotic) power of the British monarchy, a Constitution establishing a new order had to ensure that power would not become concentrated in the hands of any one person or elite group. A Westminster-style government, with the majority party's leader being automatically appointed the country's leader, was therefore rejected. So too was the idea of an appointed upper house. An appointed upper house might overrule, veto or fail to deal with measures a properly elected lower house had passed. The government would then be unresponsive to the people's will.

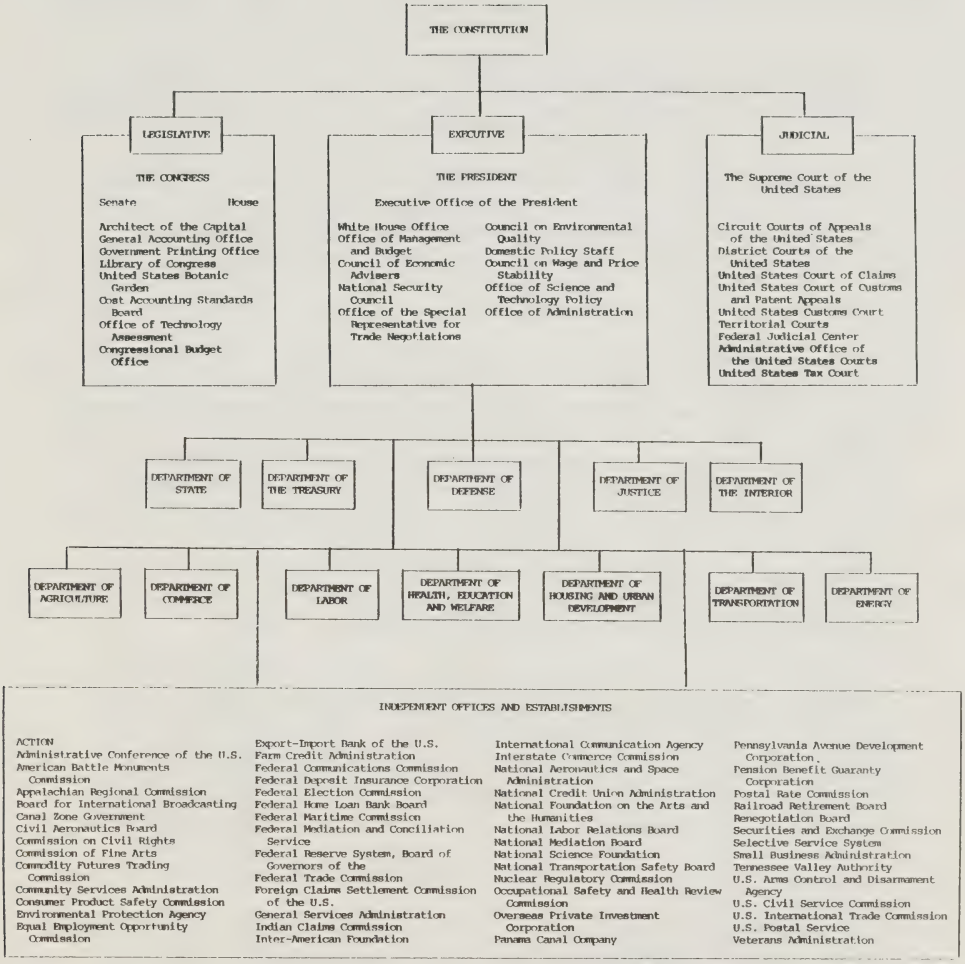
Instead of a Westminster system, the Constitution's drafters chose a federal, republican system based on a series of checks and balances. The checks and balances, found in the way representatives are chosen and in the blending of action and oversight powers assigned to each government branch,[3] prevent concentration or abuse of power.

For example, although the President is usually a member of the Democratic or Republican party,[4] the choice of President is

3 The President, the Cabinet and government agencies are referred to as the Executive Branch of government; the Congress as the Legislative Branch, and the courts as the Judicial Branch. Each branch has separate powers. See Table 4, p. 93.

4 There is no requirement that the President belong to any party.

TABLE 4 The Government of the United States



independent[5] of the majority party in Congress. House of Representatives and Senate elections are not always at the same time: members of the House must stand for election every four years; but one-third of the Senate must stand for election every two years.[6]

Each branch of government oversees some important uses of other branches' power. For example, appointments to the Cabinet[7,8] and to the judicial branch must be confirmed by the legislative branch; the executive branch can veto a legislative branch measure; the

5 In theory, the President is not chosen directly by the people: U.S. Constitution: Article II, s. 1. Rather, the people vote for members of an electoral college, and the members cast the actual votes for President. In practice, the presidential candidate who has received the most support from the populace is elected. The President is elected for a four-year term and may not be reelected more than twice: U.S. Constitution, Amendment 22.

(Citations to the U.S. Constitution in this paper are to The Declaration of Independence, The Constitution of the United States of America (United States Information Service 1972).)

6 Members of both chambers are directly elected. During the early years of the republic, Senators were chosen by the state legislatures (U.S. Constitution, Article I, s. 3). At present, two from each state are directly elected on a state-wide basis. House members are also directly elected, but on the basis of congressional districts. Suffrage for black men was assured by Constitutional Amendment 15, ratified in 1870. Amendment 19, ratified in 1902, extended the franchise to all adult women. Amendment 26, ratified in 1971, lowered the voting age to 18.

7 All appointments of heads of agencies must be confirmed, whether or not Cabinet rank goes with the post: U.S. Constitution, Article II, s. 2, para. 2.

8 Cabinet members are not members of the legislature; therefore considerations such as ministerial responsibility do not arise in the U.S. context.

judicial branch can overrule the actions of either of the other two branches by, among other things, declaring an action unconstitutional. Although each branch is to check and balance the others, the legislative branch remains paramount. It can override the President's veto;[9] can pass legislation to nullify a Supreme Court decision[10] and can impeach any agency head, any Supreme Court judge, or the President.[11,12]

The separation of powers has important effects on the policy-making process. Separation means that policies are often made independently by the executive branch and the legislative branch without consultation or coordination. Resolution of conflicts may come rather late in the process,[13] either after legislative committee hearings or following the introduction of a bill designed to overrule an executive branch policy decision.

9 U.S. Constitution, Article I, s. 7, para. 2. A two-thirds majority of members present is needed.

10 For example, a 1974 amendment to the Freedom of Information Act specifically overrode part of the Supreme Court's decision in Mink v. EPA 464 F. 2d 742 (1972) rev'd sub nom EPA v. Mink 410 U.S. 73 (1973).

11 U.S. Constitution: Article I, s. 3.

12 The power is rarely used. Although impeaching President Nixon was widely discussed in the media, the Legislative Branch did not take that action before President Nixon resigned.

13 This may depend on who the President is. President Johnson, for example, was able to avoid many conflicts with Congress by early consultation and skillful lobbying: Stephen Hess, Organizing the Presidency (Washington, D.C.: Brookings Institution, 1977), chapter 6 passim, hereafter cited as Hess.

To understand access to information during the policy-making process it is necessary to look at both the executive branch, to which the Freedom of Information Act[14] applies, and the legislative branch, to which it does not, because they are equally important policy makers.[15]

1. The Legislative Branch

The House and Senate together are known as Congress. They are of equal status; the Senate does not function as an upper house.[16]

Because they are equal, legislative measures[17] can be introduced into

14 Title 5 U.S.C. 552.

15 Although the Judicial Branch is said to make policy through its judgments intepreting the law, it is out of the mainstream of policy making insofar as it considers only that which is brought before it: it does not initiate. Its role as a policy maker will not be discussed in this paper.

The Freedom of Information Act does not apply to the Judicial Branch. During the judges' discussions before a decision is reached, no access to information is permitted. After a decision is announced, only the decision is made public; deliberative notes are not. Information concerning the subject matter of a case which has been filed by any of the parties is available from the Court Clerk's office as soon as it is filed. Trials and appelate hearings are open to the public: U.S. Constitution: Article III, s. 2, para. 5, also Amendments 6 and 7.

16 Charles J. Zinn, How Our Laws are Made, revised and updated by Edward F. Willett Jr. (Washington, D.C.: Government Printing Office, 1978) p. 3, hereafter cited as Zinn.

17 There is no distinction similar to the Canadian distinction between "government" and "private member's" bills. In 1978, more than 15,000 bills were introduced in Congress.

either chamber[18] by any member of Congress.[19] The President cannot introduce legislation;[20] indeed, the President is forbidden to appear in either chamber without an invitation.[21] Measures originating with the President are introduced by a like-minded senator or representative.[22]

The Freedom of Information Act does not apply to Congress. This does not mean, however, that information on policy deliberations is unavailable. Congressional rules provide access to information in many situations, and tradition does so in others.[23]

18 Revenue bills can only originate in the House. U.S.: Constitution, Article I, s. 7.

19 There is little or no party discipline in either chamber. Thus any member or senator can introduce a bill on any subject at any time without regard to party platforms or to bills which other party members have introduced. Personal interview, Robert Gellman, Assistance Counsel, Subcommittee on Information and Individual Rights of the House Committee on Government Operations. Washington, D.C., April 24, 1979.

20 U.S. Constitution, Article I, s. 1. Article I, s. 9, para. 18 assigns legislative powers elsewhere.

21 The Constitution provides that the President can address Congress from time to time on the State of the Union: U.S. Constitution, Article II, 2, 3.

22 Usually a draft bill is sent by the President or by a Cabinet member to the Speaker of the House or the President of the Senate in what has become known as an "Executive Communication": Zinn, p. 4.

23 For example, the Constitution requires a journal of proceedings to be kept in each chamber: Article I, s. 6, para. 3. House and Senate rules require floor debates to be open to the public, as well as committee meetings. Traditionally, next-day transcripts of committee proceedings are available to the public in the committee staff's office.

2. Committee Structure

Both the Senate and the House maintain committees. There are two kinds of committees: subject area committees which consider possible future laws and policies, and oversight committees which consider the past performance of entities involved in the administration or implementation of a law or policy. Some subject area committees also have oversight responsibilities. In the area of freedom of information, the House Committee on Government Operations has jurisdiction over the subject matter and its Sub-Committee on Information and Individual Rights has oversight responsibilites.

At present there are twenty-two standing committees in the House and fifteen in the Senate. Each committee has its own professional staff of not more than eighteen people.[24] Each committee is chaired by a member who, since 1975, has been elected from nominations made by the majority party's caucus.[25]

Committees must meet at least once a month. Their meetings must be open to the public unless a special procedure is followed. A roll call vote must be taken at a public meeting before subsequent meetings

24 Zinn, pp. 10-11. There are also several joint committees; for example, the Joint Economic Committee.

25 Before 1975, a seniority system operated so that the most senior member of the committee automatically took the chair.

can be closed.[26,27]

In many cases, especially when a measure is controversial, committees will hold public hearings. An announcement is published in the "Daily Digest" portion of the Congressional Record. Invitations are usually sent to individuals whom the committee knows will be interested. If an invitation is refused, committees can use subpoenas to require attendance. Committee proceedings are transcribed. Copies of the transcript are made available for inspection in the committee clerk's office. People who want to testify can ask to do so. While there is no right to appear, it is usual for committees to insist on hearing enough witnesses to canvass all points of view. Thus a person who wanted to testify would likely only be refused if his or her testimony would repeat the testimony of others.

As well as professional staffs attached to each committee, Congress has four expert organizations to which it can turn for information.

26 The House can only vote to close a meeting if testimony will concern national security.

27 The Senate can close its committee meetings if it determines that the matters to be discussed "will disclose matters necessary to be kept secret in the interests of national defence or the confidential conduct of the foreign relations of the United States; relate solely to internal committee staff management or procedures; tend to reflect adversely on the reputation of an individual or may represent an unwarranted invasion of privacy of the individual; may disclose law enforcement information that is required to be kept secret; may disclose certain information regarding certain trade secrets; or may disclose matters required to be kept confidential under other provisions of law or government regulation": Zinn.

These are the Congressional Research Service, the General Accounting Office, the Office of Science and Technology Assessment and the Office of Management and the Budget. The information is usually made public.

Each organization prepares research papers, sometimes on its own and sometimes at the request of a senator or representative. The Congressional Research Service prepares material at the request of any member of Congress. It may prepare independent research if it is asked to investigate a certain question, or it may prepare directed research if it is asked for information to support a certain position. In the latter situation, the information is clearly stamped "directed research," implying that it is not necessarily an objective assessment. Congressional Research Service reports are released at the discretion of the member for whom the information was prepared; after a certain time has passed (usually one month) the Congressional Research Service will ask the member if he or she has any objection to release. If not, the Congressional Research Service will make the information publicly available.

The General Accounting Office makes all of its research public. It prepares research on its own or at request. Its research is usually of a more long-term kind than that prepared by the Congressional Research Service. The General Accounting Office will prepare field studies, and undertake longitudinal investigations which the Congressional Research Service will not.

The Office of Science and Technology Assessment prepares even longer-term research projects, looking into the impact of science and technology on future policies, or into the impact of present policies on science and technology.

The Office of Management and the Budget reviews proposals for their possible impact on the economic situation of the country, and also reviews the testimony of any member of the executive branch before he or she testifies before a congressional committee.[28]

The quality of research undertaken by each organization is usually outstanding. The research reports are used both to inform members and to provide enough information to question committee witnesses closely. The reports, particularly those of the Congressional Research Service, are often regarded as authoritative and are widely quoted in Congress when policy choices are being made.

3. The Executive Branch

The President is the head of the executive branch. The branch is divided into the Office of the President, departments (or agencies),

28 The information on research services available to Congress was collected in a personal interview with Harold C. Relyea, Specialist in American Government, Congressional Research Service, on April 25, 1979.

and various advisory committees. Each department has jurisdiction over certain subject matters. Each is responsible for implementing and administering programs, as well as for making policy recommendations to the President. Each has a further responsibility to advise on proposals made by other departments.

Departments or agencies can, to a limited extent, make policy without the approval of Congress or the President.[29] This is usually done in a process known as rule-making. Under recent reforms, public comments are invited before rules are finalized. The practice is to publish a notice or proposed rules in the Federal Register with information about deadlines before which comments will be received and considered. After consideration, the agency's adopted version of the rule is published in the Federal Register. If the agency is headed by a collegial body (and most agencies are) then its deliberative sessions must be open to the public under the Government in the Sunshine Act.[30]

Advisory committees, on the other hand, do not make policy; they are limited to offering advice. Their work is an important source of policy information because their advice is often adopted by the government.

29 Professor Kenneth Culp Davis has written extensively in this area. See: K.C. Davis, Discretionary Justice: A Preliminary Inquiry (Rouge, Louisiana: Louisiana State University Press, 1969) and K.C. Davis, Administrative Law Treatise (San Diego, Calif.: K.C. Davis, University of San Diego, 1978).

30 Pub. L. 94-409 (1976) 90 Stat. 1241.

Although the Freedom of Information Act does not apply to advisory committees, the Federal Advisory Committee Act[31] requires almost all meetings of advisory committees to be open to the public. Anyone can attend and listen but there is no right to participate in deliberations.

4. The Office of the President

Each President structures an inner circle of advisors in a different way.[32] President Carter has eight senior policy advisors divided into broad groupings, such as domestic policy and economic policy. The deliberations of senior advisers and their exchanges with the President and department heads are not open to the public. Records produced during that process[33] are only made public if the President chooses to release them.

Each President chooses the heads of government agencies. From these, the President selects those who will form a Cabinet. Occasionally the Cabinet will include people who are not heads of agencies but who are special advisors on various subjects. Cabinet members are not drawn from the House or Senate. Thus there is no equivalent of ministerial

31 Pub. L. 92-463 (1972) 86 Stat. 770.

32 Hess.

33 See infra, p.129 for discussion of the policy-making process in the White House.

responsibility to the elected members. There is no doctrine of Cabinet solidarity or oath of Cabinet secrecy. Information on which Cabinet member has recommended which course of action often becomes available, although not in any routine way. The President can instruct a Cabinet member (or any head of an agency) to implement policies as long as they are of a kind which do not require legislative authorization. Usually, such instructions are announced.

B. The Law

1. Introduction

The Government in the Sunshine Act, the Federal Advisory Committee Act and the congressional hearings process all combine to open the large area of policy making which takes place outside the executive branch to the public.

The Freedom of Information Act is the most important device for opening the process within the executive branch. The statute creates a general right of access to information in the executive branch. It also contains nine exemptions to the access provisions, three of which are especially important in a discussion of the policy-making process. These are exemptions (b)(1), exempting national defence and foreign policy information "properly classified pursuant to an Executive Order";

(b)(3), allowing the operation of other statutes to remove information from the scope of the Freedom of Information Act; and (b)(5), which exempts inter-agency and intra-agency memoranda and letters. A discussion of these exemptions follows.

2. Exemption (b)(1) — The Executive Order on Classification

President Carter's executive order[34] of June 26, 1978 set out strict new controls over classification pursuant to the amended s. (b)(1) of the Freedom of Information Act. That section states:

> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; [35]

Under the language of the section, an executive order could protect a vast range of policy information about foreign relations, defence and the military from public access. Such an order would not be effective, however, in preventing congressional access for oversight and appropriations purposes.

34 Executive order (E.O.) 12065, reprinted in Access Reference File No. 35, January 1979 (Washington, D.C.: Plus Publications, 1979).

35 The original section exempted material "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

President Carter chose not to use the full extent of the power granted by the (b)(1) language. His order changed the existing executive order[36] promulgated by President Nixon by including strict criteria for classification, mandatory review and possible automatic declassification after a specified time period. Other changes include:

1. Authority to classify is limited (as it was in EO 11652) but in the new order, only twenty-one agencies (formerly twenty-five) have authority to classify. Agencies which can no longer classify include the Federal Power Commission, the Federal Communications Commission and the Department of Health, Education and Welfare.

2. Although the classification categories, "top secret," "secret" and "confidential," are kept in the new order, the criteria for using the classification "confidential" are more stringent than in the former order. The new order requires that before a document is classified, a determination must be made that significant damage would result upon its release.

3. Declassification is speeded up; unless a specific extension is ordered by a limited group of designated officials, classified information would be declassified after six years.

36 E.O. 11652: 3 CFR 343 (1974).

4. Criteria are set out for classification:

1-301. Information may not be considered for classification unless it concerns:

(a) military plans, weapons, or operations;
(b) foreign government information;
(c) intelligence activities, sources or methods;
(d) foreign relations or foreign activities of the United States;
(e) scientific, technological or economic matters relating to the national security;
(f) United States government programs safeguarding nuclear material or facilities; or
(g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to s. 101, or by an agency head.

When information is classified, not only the classification but also the identity of the original classification authority, the office of origin and the date or event for declassification or review must also appear on the document.[37]

In addition to the restrictions, there are definite prohibitions in the executive order which state that classification may not be used to conceal violations of law or inefficiencies; nor may documents be classified after an agency has received a request for the document under the Freedom of Information Act. Classification may not be used on documents which have already been declassified or released to the public.[38]

37 Ibid., s. 1-607.

38 Ibid., s. 3-303.

The executive order creates an oversight mechanism called the Information Security Oversight Office. Not only is that office charged with seeing that review is carried out in a timely way, it also has responsibility for appeals concerning classification internally if such appeals result.

Information can be transferred to the General Services Administration for accession into the Archives. In that case, the Archivist can declassify and downgrade the classification following this executive order, the directives of the Information Security Oversight Office and the supplying agency's guidelines.

A notable feature is the requirement that the Archivist review, declassify and downgrade all information classified by the President, the White House staff, committees or commissions appointed by the President or others acting on the President's behalf, as soon as a presidential administration terminates.

As is stated in the order's preamble, freedom of information considerations such as the public interest in government information takes precedence over classification if "the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure."[39]

39 Ibid., s. 5-502.

Generally speaking, existing classified information is to be systematically reviewed and either declassified or noted as appropriate for a continuation of classification twenty years from the date of its creation. Periods of extension are to be not more than ten years. If information is marked for downgrading or declassification at a certain time, then it is automatically declassified without notice to those who gave the information.

Special access is available for historical researchers and people who previously occupied policy-making positions to which they were appointed by the President.[40]

Finally, the order sets out sanctions against officers and employees of the United States government who knowingly and willfully classify or continue to classify information contrary to the order.

The executive order also states that information contained in the same document is severable. Certain paragraphs may be classified and certain others in the same document left without classification.[41]

40 Ibid., s. 5-502.

41 For example, at the State Department, all telegrams coming from foreign embassies bear the mark "C" or "U" next to each paragraph. This is to signify that the paragraph should be classified or is unclassified: personal interview, Richard Scibner, Special Assistant to the Under-Secretary of Science Technology and Security Assistance, Washington, D.C., April 26, 1979.

3. Exemption (b)(3) — Other Statutes

Exemption (b)(3) was not amended in 1974. In 1975, however, the section was the subject of a special review, following the Supreme Court's decision in Administrator, Federal Aviation Administration (FAA) v. Robertson.[42] Congress strongly disagreed with the Supreme Court decision, and specifically overruled it in an amendment to (b)(3) passed in 1976.[43]

The new section is as follows:

> (b)(3) Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute
>
> (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
>
> (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; [44]

In FAA v. Robertson the FAA claimed that the Federal Aviation Act was a (b)(3) statute and s. 1104 applied to exempt Systems Worthiness Analysis Reports from disclosure under the Freedom of Information Act. S. 1104 granted a very broad power to withhold information at the Administrator's sole discretion. The Supreme Court held that when an

42 422 U.S. 255 (1975).

43 Pub. L. 94-409 (1976).

44 The underlining shows the changes made.

agency asserts a right to withhold information based on a specific statute of a kind described in exemption 3 all the court had to do was to determine the factual existence of the statute "regardless of how unwise, self-protective or inadvertent the enactment might be."[45]

The House Report on amendments to the Freedom of Information Act suggested that the interpretation was much too broad.[46] Not all statutes should qualify as (b)(3) statutes, the Report argued, particularly those which allowed withholding as a matter of unfettered discretion.

If the decision in Administrator, FAA v. Robertson had not been overturned its general statement that all existing statutes with restrictions on disclosure could be used to justify withholding under (b)(3) would have substantially affected not only access to information during the policy-making process, but also access after policies had been chosen. This is so because the majority of federal statutes contain some provision concerning withholding whereas few contain any time limit on withholding after which information is be be released.

Since the amendment, a major controversy has arisen in "reverse"[47]

45 Mr. Justice Stewart, 422 U.S. 255 at p. 270.

46 House Report 94-880 at p. 23.

47 So called "Reverse" suits are those where, instead of an applicant suing to enjoin the government from withholding information, the (cont'd)

freedom of information cases. In these cases, submitters, usually companies, have argued that the Trade Secrets Act[48] is a (b)(3) statute, and therefore the company's information is exempt.

The Trade Secrets Act states:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment of official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with such department or agency or officer or employee thereof, which information concerns or relates to trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permit any income return or copy thereof or any books containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000 or imprisoned not more than 1 year, or both; and shall be removed from office or employment.

The first case on this point to reach the Supreme Court was Chrysler v. Brown.[49] In that case, Chrysler sued to enjoin the government from releasing reports which concerned Chrysler's compliance with equal opportunity legislation.

47 (cont'd) submitter of information sues to enjoin disclosure. For an excellent discussion of the issue, see Campbell, N.D., "Reverse Freedom of Information Act Litigation: A Need for Congressional Action" (1978) 67 Georgetown Law Journal 103.

48 18 U.S.C. 1905.

49 441 U.S. 281 (1979).

The Chrysler v. Brown opinion does not lend itself to easy interpretation.[50] It is clear that the Supreme Court held that while the Freedom of Information Act does not authorize reverse suits, court review was available under the Administrative Procedures Act.[50a] On the trade secrets point, it is possible to interpret the decision as holding that the Trade Secrets Act is a (b)(3) statute. The Supreme Court sent the case back to the Court of Appeals for a determination as to whether the information in question fell within the wording of the Trade Secrets Act.

The potential effect of a decision that the Trade Secrets Act is a (b)(3) statute on commercial and economic policy-making is substantial. The language of the Trade Secrets Act is much broader than the exemptions under the Freedom of Information Act taken together; and the fact that reverse freedom of information suits are not to be allowed under that statute may result in companies refusing to supply information necessary for policy making.[51] It is possible that the Court of Appeal may give

50 Both parties to the case are convinced that the victory was theirs: personal interview, Burt Braverman, Counsel to Chrysler, Washington, D.C., April 26, 1979; personal interview, Nancy Duff Campbell, Counsel to intervening public interest groups, Washington, D.C., April 27, 1979. See also Huffman, Diana, "No one knows who won 'Chrysler' case" Legal Times of Washington, Vol. I, no. 47, April 23, 1979.

50a S. 10(e), 5 U.S.C. 706.

51 A major government supplier, Sears Roebuck, announced that it would no longer contract with the government as it could not be sure its information would be kept confidential: Washington Post, April 25, 1979. Minority group representatives argue, however, that the (cont'd)

adequate guidance as to what kinds of information fall within the Trade Secrets Act. In the meantime, the Department of Justice has asked all agencies to give information suppliers notice of their intention to release information which otherwise might give rise to a reverse suit. Agencies will not listen to information-suppliers' views before granting internal appeal for access. In addition, the Department of Justice has stated because of the confusion created by Chrysler v. Brown it will not prosecute government employees for violations of the Trade Secrets Act if the release of information was made in a good faith effort to comply with the Freedom of Information Act.[51a]

Although it is disappointing that the Supreme Court did not clarify the amended (b)(3), the 1976 wording and the House Report on the need for the amendment clearly indicate that the "other statutes" exemption is to be narrowly construed. Many existing statutes will not meet the new tests. If, however, the Court of Appeal considers that the Trade Secrets Act does meet the tests and that its wording is to be broadly interpreted to include equal opportunity compliance reports and the

51 (cont'd) confidentiality of equal opportunity compliance reports is based on a desire not to be embarrassed rather than a desire to withhold information from a competitor: personal interview, Nancy Duff Campbell, Centre for Law and Social Policy, Washington, D.C., April 1979.

51a S. 9-2.05, United States Attorneys Manual cited in FOIA Update (Washington, D.C.: Department of Justice: Office of Information Law and Policy, Winter 1980) Vol. 1, No. 2, p. 6.

like, then it will become extremely difficult for the public to get many kinds of economic information during the policy-making process.

4. Exemption (b)(5) -- Inter- and Intra-Agency Memoranda

The text of exemption (b)(5) reads as follows:

> (b)(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Its reference to the litigation process means that the Federal Rules of Discovery may govern its scope. Basically, it seeks to protect the deliberative process by incorporating the government's common law privilege against discovery in litigation,[52] but its success has depended on the judicial gloss added to its language. For example, both attorney work-product privileges and attorney-client privileges have been included in the exemption,[53] as has executive privilege to the extent that the privilege is to encourage "open frank discussions on policy matters between subordinates and chief,"[54] and to protect

52 H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 2, 9 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess. 6-7, 13-14 (1964).

53 Mead Data Central Inc. v. U.S. Dept. of the Air Force, 566 F. 2d 242 (DC Cir. 1977), and see Porter County Chapter of the Izaak Walton League of America v. AEC, 380 F. Supp. 630 (N.D. Ind. 1974) quoted in Marwick, C.M., Litigation under the Amended Freedom of Information Act (Washington, D.C.: Center for National Security Studies 1976 and annually thereafter).

54 Ibid., quoting Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 40 FRD 318 (DDC 1966) affirmed 384 F. 2d 979, cert. denied 389 U.S. 952 (1967).

the quality of agency decision-making.[55] In effect, then, the cases have made a number of distinctions among kinds of information. A brief enumeration follows:

Fact -- opinion

As exemption (b)(5) is designed to protect the deliberative process, it follows that there can be no protection for purely factual material. The distinction, established in EPA v. Mink,[56] is between "material reflecting the deliberative or policy-making process on the one hand and purely factual, investigative matters on the other."[57]

Several cases have made exceptions to this principle, invariably to protect the government's ability to get similar information in the future. Thus air crash information has been protected[58] as has peer evaluation of proposals for research grants.[59]

Purely factual material may be protected if, for example, the choice

55 NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

56 410 U.S. 73 (1973).

57 Ibid., at 89.

58 Cooper v. Dept. of the Navy, 558 F 2d 274 (5th Cir. 1977); Brockway v. Dept. of the Air Force, 518 F 2d 1184.

59 Wu v. National Endowment for the Humanities, 460 F 2d 1030 (5th Cir. 1972).

of facts or the way in which they are summarized reflect the deliberative process.[60]

Documents containing either factual or deliberative material may be labelled "investigation" or "evaluation" or "analysis." These labels make it difficult to draw a line between facts and opinions. Vaughn v. Rosen[61] ruled that the following must be disclosed: "factual investigative or evaluative portions" of documents which "reflect final objective analyses of agency performance under existing policy" and which "reveal whether the agency's policy is being carried out."

In all cases the government carries the burden of proving that there is a genuine deliberative process and that it falls within exemption (b)(5).[62] The Court can require the government to provide a detailed index of documents and the reasons for withholding each one.[63] The index allows the applicant to form some reasonable notion of the government's case so that the applicant's side can be argued effectively.

Discussions - Decisions

The deliberative process ultimately leads to a decision, even if it is

60 Washington Research Project v. HEW, 504 F 2d 238 (D.C. Cir. 1974) aff'd 523 F 2d 1136 (D.C. Cir. 1975).

61 383 F Supp. 1049 (D.D.C. 1974) aff'd 523 F 2d 1136 (D.C. Cir. 1975).

62 Ibid.

63 Ibid., and see Robbins Tire and Rubber Co. v. NLRB 414 F. Supp. 1074.

a decision to do nothing.[64] While options are being discussed, the opinion portion of the documents created during the process is protected by the exemption.

Congressional intent in this was explained by Ackerly v. Ley:[65]

> Congress intended that Exemption (5) was to reflect the privilege, customarily enjoyed by the Government in its litigation, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended.
>
> ... In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.

Once a decision is made, however, it is accessible, even if it has not yet been announced.[66]

Pre-decisional documents - post decisional documents

Just as a decision becomes accessible once made, so too do documents created after the decision which refer to it.[67] Although the logical implication of the (b)(5) rationale that the deliberative process needs protection is that once a decision is made, there is no longer a need

64 NLRB v. Sears Roebuck, op.cit., ruled that such decisions must be released.

65 420 F 2d 1336 at 1341 (D.C. Cir. 1969).

66 Merrill v. Federal Open Market Committee, 565 F 2d 778 (D.C. Cir. 1977).

67 NLRB v. Sears Roebuck Co., op.cit.

to protect the process which led to the decision, thus pre-decisional documents should become accessible, the courts have held otherwise. Such documents are accessible, but only to the extent that they are factual.[68] In the judges' view, if all pre-decisional documents were released, then civil servants would know that everything they said could be made public and this might inhibit the free flow of advice and ideas in subsequent decision-making processes.

Several commentators[69] suggest that the "free flow of advice" argument is a spurious one. Advice will not cease, and the knowledge that there will be subsequent public scrutiny of that advice will have a beneficial -- not detrimental -- effect. As Charles Koch puts it:

> The nondisclosure of policy memoranda is supported by the desire to allow a free and frank exchange of ideas and to prevent bureaucrats from operating in a "fish bowl." However, this non-disclosure rationale is contrary to the disclosure bias of the Act. Moreover, the necessity for protection of all internal memoranda, either factual or opinion, is overstated. The rationale loses its validity as time passes after the final determination for which the document was drafted is made. Furthermore, if the staffs of the agencies realized that some time in the future,

68 Sterling Drug Inc. v. Federal Trade Commission, 450 F 2d 698 (D.C. Cir. 1971) and Consumer's Union v. Veteran's Administration, 301 F Supp. 796 (S.C.N.Y. 1969).

69 Statement of Ralph Nader on S. 1142 before the Senate Subcommittee on Administrative Practices and Procedures, Separation of Powers and Intergovernmental Relations, April 12, 1973, quoted in Wellford, H., "Rights of People: The Freedom of Information Act" in N. Dorsen and S. Gillers, eds., None of Your Business: Government Secrecy in America (New York: Penguin Books, 1974) at p. 203; and Koch, C., "The Freedom of Information Act: Suggestions for Making Information Available to the Public" (1972) 32 Maryland L. Rev. 189.

> their work product would go on the public record, they would do a more careful, workmanlike job. If they knew that their work could be questioned in the future, even though the relevant decision was irrevocable, they would be more accurate and unbiased, and perhaps would avoid bowing to the special interests who, under the present system, would be the only ones likely to know their role in the decisionmaking. The decisionmaking process as a whole may benefit from criticism of the internal work product or the decisional process which resulted in an official decision. Staffs will continue to give agency officials their opinions because they must. The worst that can happen is that the agency staff and agency officials would communicate orally more often; which may be a beneficial result from another point of view. [70]

Document not referred to -- document incorporated by reference

If, however, the decision "expressly"[71] adopts or relies on information contained in a pre-decisional document or another document which would otherwise have been exempt under (b)(5), such as a staff memorandum,[72] that document loses its protection and must be made accessible.[73] So too must the otherwise exempt documents be released if they are used as justification of the decision,[74] or if they

70 Koch, op.cit., at p. 214.

71 NLRB v. Sears Roebuck Co., op.cit.

72 American Mail Line Ltd. v. Gulick, 411 F 2d 296 (D.C. Cir. 1969), Niemeyer v. Watergate Special Prosecution Force, 565 F 2d 967 (7th Cir. 1977).

73 NLRB v. Sears Roebuck Co., op.cit.

74 Grumman Aircraft v. Renegotiation Board, 482 F 2d 710 (D.C. Cir. 1973) rev'd 421 U.S. 168 (1975).

reflect policies or interpretations of the law which the agency has actually adopted.[75]

Document adopted -- document not adopted

Documents which are adopted by an agency must be released, whether or not they contain deliberative material.[76] Although this requirement is found in some (b)(5) cases, it is possible to treat these kinds of documents as more susceptible to the requirements of s(2)(B): "... those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register ..." must be made available for public inspection and copying.

Document having no effect on a member of the public -- document affecting a member of the public

Like the adopted -- not adopted distinction, the distinction between whether a document might affect a member of the public or not might more properly be considered under section (a)(2). That section, which is designed to eliminate secret law, requires that documents which affect the public be made accessible.

75 Schwartz v. IRS, 511 F 2d 1303 (D.C. Cir. 1975).

76 NLRB v. Sears Roebuck, op.cit.; David B. Lilly v. Renegotiation Board, 521 F 2d 315 (D.C. Cir. 1975).

Cases such as NLRB v. Sears Roebuck Co.,[77] Kent Corp. v. NLRB,[78] and Sterling Drug Co., Inc. v. FTC[79] have considered the problem from the (b)(5) perspective. In Sears Roebuck the court stated it would be reluctant to hold that instructions to staff which affected a member of the public could be withheld. In Kent Corp., however, instructions to staff were withheld in a situation where the instructions were in the form of hand-written notes made by staff members during a deliberative meeting of the Labour Relations Board.[80] In Sterling Drug, the court ordered the agency to reveal the orders and interpretations of law which it actually used in determining the cases before it.

Opinions of experienced people -- opinions of experts

As was noted above, EPA v. Mink established the proposition that facts and opinions were severable and, once severed, the facts must be accessible. Several cases have distinguished between kinds of opinions, and have held that some opinions, particularly those of experts, are

77 Op.cit.

78 530 F 2d 612 (5th Cir. 1976).

79 Op.cit.

80 Under the Government in the Sunshine Act (1976), deliberative meetings of agencies headed by collegial bodies are open with the odd result that oral communication between agency members is not protected but written communications may be under (b)(5). J.T. O'Reilly, Federal Information Disclosure (New York: McGraw-Hill Book Company, 1977) hereafter cited as O'Reilly.

to be treated as facts and are to be made accessible. In Tennessean Newspapers v. Federal Housing Administration[81] the court held that the "finished work product of a professional" was not part of a deliberative process but was an analysis of the facts involving a professional opinion. Thus the documents, which contained reports of a real estate appraiser, were ordered released.

So too, expert scientific opinions have been ordered released[82] as have "inferences based on facts observed by an expert where the inferences depend on the expert's expertise."[83]

Internal Access -- Preferential Access

Information which is not exempt cannot be given to one person but withheld from others because the FOIA specifies that "any person" is to have a right of access. On the other hand, exempt information has been released to some but denied to others.[84] Nonetheless, Congress did not address the issue in its 1974 or 1976 amendments. O'Reilly points

81 464 F 2d 657 (6th Cir. 1972).

82 Union of Concerned Scientists v. Nuclear Regulatory Commission, Civ. No. 76-370 (D.D.C. 1977).

83 Moore-McCormack Lines, Inc. v. ITO Corp. of Baltimore, 508 F 2d 945 (4th Cir. 1974).

84 Ralph Nader, Hearings on Executive Privilege, etc., before a subcommittee of the Senate Judiciary Committee and a subcommittee of the Senate Committee on Government Operations, 93rd Cong., 1st Sess. (1973) Vol. I at 207, and McGeorge Bundy, ibid., Vol. I at 280.

out that "an argument can be made that it is an abuse of discretion to favour a specific class of requestor over another because of some nonarticulated preference."[85] Abuse of discretion is punishable under the Administrative Procedures Act.[86]

If a case concerning preferential access is litigated, then the fact that the agency has disclosed it to someone with no special qualities, such as having a security clearance, impeaches the agency's claim that the information needs the protection of an exemption.[87]

An agency cannot refuse access to exempt documents if the request comes from Congress as Congress has a constitutional right to call for information.[88] Disclosure to Congress does not mean the document loses its exempt status.[89]

5. The Office of Information Law and Policy

Any agency desire to withhold information is subject to Department of Justice oversight. This oversight was established not by the Freedom

85 O'Reilly, at p. 9-18.

86 Op.cit.

87 Halperin v. Department of State, Civ. No. 75-674 (D.C.D.C. 1976).

88 Constitution: Article I, s. 8.

89 Aspin v. Dept. of Defence, 491 F 2d 24 (D.C. Cir. 1973).

of Information Act but by a Department of Justice memorandum.[90] Briefly, at the point where an agency is internally considering an appeal from an initial denial of information, it must consult the Office of Information Law and Policy.[91] The office gives guidance on whether information can properly be withheld under one of the exemptions. The regulation contains a powerful sanction if an agency ignores the Department of Justice's advice: the department can refuse to defend an agency in litigation brought following a refusal. Government agencies must be represented by the Department of Justice or not at all. Neither their staff lawyers nor lawyers retained from the private bar have authority to represent an agency in litigation without Department of Justice approval. The department has told each agency that it will not defend cases unless the release of information would have a substantial harmful effect on a legitimate government interest -- even if withholding would otherwise be possible under the Freedom of Information Act.[92]

Thus the Department of Justice has, in effect, narrowed the discretion to withhold given by the Freedom of Information Act. The Department

90 Attorney General's Memorandum, May 5, 1977, reprinted in Congressional Record (Daily edition) May 17, 1977: s. 7763, following 1974 amendment requiring annual reports on implementation by the Department of Justice, FOIA, s. (d) post (7).

91 Any agency can consult the office for guidance at any time; it is mandatory at the stage of final internal review.

92 Personal interviews, Douglas S. Woods, Assistant Director, Office of Information Law and Policy, Washington, D.C., April, 1979.

has been quite rigorous about encouraging agencies to release as much information as possible. The effect has not been measured but the Office of Information Law and Policy believes its work has resulted in the release of a great deal of technically exempt material.[93] Before the Department promulgated this rule, it lost the majority of freedom of information cases. That situation is slowly changing.[94]

C. The Policy-Making Process

The policy-making process in Sweden might be likened to two pyramids, one on top of the other, with broad sources of policy proposals narrowing to commissions of inquiry, then widening again during the subsequent broad consultation process, and narrowing finally to legislative decision-making. A more appropriate model for the United States might be three wheels, one for the White House, one for agencies, and one for the Congress. Each can turn independently and can make certain policies without consulting the others; but in some cases, the wheels must work together; consultation and interaction are essential. Therefore, it is perhaps easier to understand the U.S. process if each is considered separately.

93 Personal interview, Quinlan J. Shea, Director of Privacy and of Information Appeals, Department of Justice, Washington, D.C., April 1979.

94 Personal interview, David Vladeck, staff attorney, Freedom of Information Clearinghouse, Centre for the Study of Responsive Law, Washington, D.C., April 1979.

1. Policy-Making in the Agencies

Agencies have the power to make policies within their own spheres. These policies can be embodied in a number of written forms, such as tax letters (Internal Revenue Service), circulars (Office of Management of the Budget), letters to departments (Department of Justice on legal matters), directives (all agencies to their own staff). Each of these policy instruments can be formulated entirely within an agency. The Freedom of Information Act requires that each be available when it is finalized or when it has been adopted as a general statement of agency policy. Some policy instruments, such as

> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; 95

must be published in the Federal Register. Other policy instruments such as final opinions, statements of policy adopted but not published and instructions to staff which affect a member of the public must be made available on request.[96]

These policy instruments may be suggested, discussed and finalized without any information becoming public until the final decision is made. All of the information can be protected under exemption (b)(5), which concerns inter- and intra-agency memoranda. Once a final decision

95 FOIA, s. (a)(1)(D).

96 FOIA, s. (a)(2)(A)-(C).

or policy instrument is formulated, then any material which is specifically referred to as the basis for adopting the policy instrument becomes available because it will have been "incorporated by reference."[97]

The entire agency deliberative process can arguably be protected under the Freedom of Information Act. It does not appear, however, that agency policy making goes on completely away from public scrutiny. First, as court interpretations of the (b)(5) exemption require severance and release of factual material, observers outside an agency can make educated guesses about the policies which are likely being considered based on the facts which are accessible. Second, the Department of Justice's view that even technically exempt material should not be withheld unless its release will have a substantial adverse effect may mean that some deliberative material is available. Agencies are therefore likely to focus their protection efforts on information the premature release of which would mislead people, would result in undue gain or loss, or would hinder full and frank discussions of policy choices.

97 For example, in announcing certain changes in the Farm Loan Program, the Secretary of Agriculture, in answer to a question, said that in formulating these changes, he had relied on the opinion of his General Counsel which was given to him on a certain date. Although the Department of Agriculture had no intention and did not want to release the General Counsel's opinion (which would otherwise have been protected under exemption (b)(5)), the Department of Justice advised that it had been incorporated by reference through the Secretary's statement (however offhand) and therefore must be made available: personal interview, Quinlan Shea, Department of Justice, Washington, D.C., April 23, 1979.

Other agency jurisdiction concerning policy-making is found in the rule-making process which many program-oriented agencies follow to implement their mandate. Issues surrounding the rule-making procedure are usually characterized as concerning a notice and comment period, a prohibition against ex parte communications to the decision-maker, and a revulsion towards secret law.[98]

2. Policy-Making at the White House[99]

The President uses four main instruments to communicate policy choices or proposals. First, there are occasional addresses to Congress on the State of the Union which may contain suggestions about future policy proposals; second, there is the administration's legislative package which is sent to Congress in an Executive Communication; third, there are Executive Orders which are made under a delegation of authority found in the Constitution; and fourth, there are Directives which are aimed at setting out procedures for the Executive Branch to follow.

The process for arriving at the final content of each policy instrument

98 For a general discussion see Larry Fox, Freedom of Information and the Administrative Process (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 10, 1979) and David Mullan, Rule-Making Hearings: A General Statute for Ontario? (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 9, 1979).

99 This information was gathered in May, 1979.

is roughly similar, although the Administration's legislative package is subject to a more formal procedure under President Carter. Almost all information generated during the process is exempt from freedom of information provisions either because it falls within s. (b)(5) or because a claim of executive privilege can be made for it.

a) The President's Staff

No matter what the source, an idea for White House policy-making will go to one of President Carter's eight senior staff advisors. The staff advisor will circulate the idea among affected or interested agencies, will occasionally consult the outside interests which might be affected, will play a mediator's role among agencies which might disagree, and ultimately will prepare a Decision Memorandum.

The Decision Memorandum is given to the President. Decision memoranda follow more or less the same format. They begin with a statement of the issue, naming the people or groups who have been consulted or who have reviewed the memorandum; they then set out the options, including the arguments for and against each one. A question will sometimes be attached asking what involvement the President wants to have; as, for example, whether he will announce the decision or whether the relevant Secretary should announce it from the White House, thus lending White House support to the announcement; or whether it should be announced

by a Senator or Representative in his or her home district.[100]

Domestic policy making is subject to a special review system which sets up four different processes "aimed at ensuring that domestic issues are studied thoroughly, commented upon by the relevant agencies and departments and appropriately followed through in policy terms."[101]

The legislative program review system is undertaken by a task force chaired by the Vice-President. The task force is made up of Cabinet members and Executive Office staff. Assistant Secretaries are the source of items to be considered by the task force; they prepare lists with an indication of priorities for items which might form part of the domestic legislative package. The list may include a note concerning laws which may be running out, as well as an indication of ideas for new programs. The President also submits his priorities to the task force.

None of the lists or minutes of the task force are made public.

The task force ultimately produces a legislative agenda which is sent to the President for approval. The task force agenda goes through the

100 The information on White House procedure comes from personal interviews with Patricia Yarham and Joanne Hurley, both Special Assistants, Domestic Affairs and Policy Staff in the White House, Washington, D.C., May 14, 1979.

101 White House release, "Establishment of the Presidential Democratic Policy Review System," Office of the White House Press Secretary, September 14, 1977.

same senior staff process as other policy documents. A senior staff person is responsible for preparing a Decision Memorandum for the President.

The Decision Memoranda are not made public nor are they circulated to the agency heads or other participants in the task force's work.

b) Cabinet Consultation

The Cabinet is consulted more often in President Carter's administration than it was in the six previous administrations.[102] At the inception of the Administration on January 20, 1977, Carter announced that the Cabinet would meet every Monday from 9:00 to 11:00 a.m. In mid-1978 the system was changed to a meeting every second Monday. All Cabinet members try to attend these meetings and all Secretaries do. Departmental officials do not attend; however, the Cabinet Secretary and his deputy (both White House staff members) do attend to take minutes.

An agenda of issues is prepared by the Cabinet secretary for the President's use. The agenda is drawn from brief summary reports prepared by Cabinet members and submitted to the White House by the Friday or Saturday preceding the meeting. The original of the agenda

102 Hess, Organizing the Presidency.

is given to the President and a copy to the Vice-President. There is no further distribution of the agenda.

Cabinet meetings are informal consultation and discussion sessions. The President, who chairs the meeting, usually reports on his activities. Cabinet members then report on their activities. There is an off-the-record discussion of the issues of the day.

Informal minutes of the meetings are circulated to all Cabinet members on a "for your eyes only" basis. A minute book is kept and is signed by the Cabinet Secretary.

The Cabinet has occasionally been subdivided into special issue groups, such as the economic policy group, chaired by Secretary of the Treasury; however, there is no formal Cabinet committee.

Decisions are not made at Cabinet meetings. There is no automatic press briefing after Cabinet meetings, although there may be one depending on the issues which have been discussed.

In sum, then, White House policy-making is characterized by wide consultation with Cabinet members, departments and agencies. The process is, however, protected from the eyes of the public.

Congress has the power to subpoena Cabinet officers to testify. It does not, however, have the power to subpoena documents. Such a

subpoena would be resisted with a claim of Executive privilege. In addition, the White House could refuse to testify on the basis that Congress was acting outside the scope of its authority.[103]

3. Congressional Policy-Making

The Freedom of Information Act does not apply to Congress. Nonetheless, nearly the entire congressional policy making process is open to public scrutiny, and often to public participation.

Congress speaks through four instruments -- bills, joint resolutions, concurrent resolutions and simple resolutions -- but only bills and joint resolutions can become law. Concurrent resolutions and simple resolutions relate to congressional practices.

Any member can introduce any number of proposed bills or resolutions at any time. An enormous number of proposals are put forward: for

103 President Eisenhower, in refusing to give information to Senator Joe McCarthy's Committee on Un-American Activities, said that the purpose for which the information was wanted was not "a valid legislative purpose." A similar answer was given by President Washington when the House of Representatives sought documents concerning the Jaw Treaty; there, on the basis that the House had no power to review treaty arrangements. In fact, the Senate is required to ratify treaties under the Constitution. Had the Senate asked for the material, it is likely it would have been produced: Relyea, op.cit.

example, in 1978, 15,000 bills were introduced.[104] Those which the Clerk of the Senate or House believe have a chance or passing are referred to a committee. The committee chair decides the order in which bills will be considered.

Committees hear witnesses and deliberate in public.[105]

After the hearings the committee meets in a business session, called the "mark-up." As its name suggests, each section of the proposed measure is marked for changes as a result of testimony received and the committee members' views.

The mark-up session is public.

The committee may report on a measure favourably or unfavourably. If the committee has reached an unfavourable conclusion, instead of reporting it will usually table the bill, thus preventing further action. If the conclusion is favourable, the Committee prepares a report for the House.

104 Such a vast (by Canadian standards) number of bills serves a useful political purpose. As there is no party discipline in Congress and as there is no majority party policy to which all members might be required to subscribe, members can introduce legislation favourable to their constituents. They can return home to say they did everything possible to look after the constituents' interests, but it's the clerk's fault that the bill did not go to committee.

105 See infra, p. 98, for a discussion of committees' structure.

The report must describe the purpose and scope of the bill, the reasons for the committee's recommendations, all consequential changes in existing law (including laws which may be repealed), any supplementary minority or additional views that any committee member wants to add, and any Executive Communication concerning the matter. Under rules adopted since 1975 and under the Congressional Budget Act[106] of 1974, the report must contain information about the bill's effect on the budget, a summary of any overview findings made by the Committee on Government Operations, and a detailed analytical statement concerning the inflationary impact, if any, if the bill is implemented.

Committee reports are made public as soon as they are tabled.

> Committee reports are perhaps the most valuable single element of the legislative history of the law. They are used by the courts, executive departments and agencies, and public generally, as a source of information regarding the purpose and meaning of the law. [107]

Upon receiving a report, the House usually resolves itself into a Committee of the Whole House on the State of the Union to consider both the report and the proposed bill. The time for debate is strictly controlled.[108] At the end of the time, the Chair stops the debate

106 31 U.S.C. 11.

107 Zinn, p. 16.

108 Congressional rules also impose time limits on committee considerations and provide mechanisms for challenging attempts to delay or defeat the normal process of legislative consideration. Detailed information on these procedures are contained in the (cont'd)

and a second reading of the bill begins. Second reading is a section-by-section consideration. During this time amendments may be offered to each section.[109] Strict time rules prevent any attempt at filibuster tactics in the House, but in the Senate filibusters are possible because debating time is not limited in the same way.

At the end of second reading, the Committee of the Whole House rises and reports the bill, and any amendments, to the House. The Speaker then asks, "Shall the bill be engrossed and read a third time?" If the House agrees, it is read a third time by title only and voted on. If the House does not agree, no further action is taken.

The bill is then printed and sent to the Senate.[110] The Senate refers it to its relevant Standing Committee. The Senate committee process is similar to that used in the House. All committee meetings must be open to the public; however, a majority may vote to close hearings under certain conditions.

108 (cont'd) House Rules and Manuals prepared by Wm. Holmes Brown (Washington, D.C.: Supt. of Documents, new edition each session); the Senate Manual (Washington, D.C.: Supt. of Documents, new edition each Congress); Clarence Cannon, Cannon's Procedures in the House of Representatives (Washington, D.C.: Supt. of Documents); and the Congressional Record (Washington, D.C.: Supt. of Documents, daily).

109 In the House, a proposed amendment must be germane to the issue; in the Senate there is no such rule. In the Senate, amendments on many different subjects may be proposed as additions to any bill regardless of its main purpose.

110 If a bill originates in the Senate the same procedures are followed, except the House considers the bill after the Senate has passed it.

The committee prepares a report for the Senate. The Senate debates the report and the bill. Amendments, germane or otherwise, can be proposed at second reading.

If the Senate passes the bill, it is returned to the House with a note of the action taken.

If the Senate makes amendments to the House bill and the House disagrees, either can request a Conference. The Speaker of the House then appoints House "managers" and the President of the Senate appoints Senate "managers." They meet to resolve the differences, if possible. The managers (or "conferees") must limit their discussion to the clauses on which there is disagreement. They cannot modify any other provision.

The conference meetings were opened to the public under a 1977 House rule.

The conferees prepare a report in which they outline their recommendations. The report must be signed by the majority of the Conference Committee; those who disagree cannot append minority views. Neither House nor Senate can amend any of the recommendations; each must be entirely accepted or rejected. If the committee reports that there are clauses on which it cannot agree, either chamber can vote to appoint new managers or to recommit the report to the committee.

Assuming all goes well and agreement is reached, a bill will finally be approved by both chambers. The original papers are sent to an enrolling clerk who prepares a final official version. This bill is signed first by the Speaker of the House and then by the President of the Senate. A copy is sent to the President for signature, and the official version is made public at the same time.

The President must respond within ten days. Before doing so, he usually circulates the bill to interested departments and asks their advice.[111] If the President approves, of if the ten-day period passes, the bill becomes law. If the President vetoes the bill, it is returned with an explanation to Congress.

The President's message is made public at the time it is sent to Congress.

Upon receiving a veto, the Clerk calls the roll in answer to the question, "Will the House on reconsideration agree to pass the bill, the objections of the President to the contrary notwithstanding?" If fewer than two-thirds of the members present vote in favour, the bill is defeated. If two-thirds or more vote in favour, then the bill and the President's objections are sent to the Senate for its action.

In a similar procedure, the Senate votes on the measure; a two-thirds majority is also required for the bill to pass.

111 See infra, p. 99 ff for a discussion of the role the President's staff plays in this process.

The bill becomes law on the date it is passed or on the date the President signs, unless the bill expressly provides for a different effective date.

As has been mentioned in the earlier section on congressional structure, an enormous amount of deliberative material is made available through the congressional process of hearings, speeches, submissions and open committee meetings. In the Executive Branch, agency final opinions, orders, directives and the like must either be published or made available, but in White House policy making, release of deliberative material is entirely discretionary. President Carter campaigned on a platform of, among other things, open and accessible government, and it appears that his philosophy and use of wider consultative process in policy making than his predecessors has resulted in a general climate of openness in the Executive Branch.

D. Conclusion

It is not only President Carter's commitment which is responsible for the climate of openness in Washington. The 12-year history of the Freedom of Information Act and its subsequent amendments; the considerable body of court interpretations (generally the courts have ruled against withholding); the refusal of the Department of Justice to defend an agency even if an exemption applies, unless the agency can show that harm would result from disclosures; the Government in the Sunshine Act

and the Federal Advisory Committee Act all have important roles in the openness of government.

Each of these also plays an important part in the policy-making process. In addition, a very large body of information is generated in Congress, to which none of the statutes on openness apply. The quality of policy and deliberative information which is produced by the U.S. system far exceeds that which is produced in Ontario. In large part, this is due to the much greater resources available to members of Congress, much greater responsibility for policy formulations which all members, both majority and minority, share; and the committee oversight inquiry system which is a genuine mechanism for accountability.

CHAPTER IV

AUSTRALIA

A. Structure of Government

Australia, a former British colony, is now an independent federal state with a written constitution.[1] Queen Elizabeth II is the head of state. She is represented in Australia by a Governor General, and by six state governors whose powers are set out in the constitution.[2]

1 The Commonwealth of Australia Act was passed by the British Parliament in 1900. For a discussion of the history, see Geoffrey Sawyer, Modern Federalism (Carlton, Australia: Pittman Publishing Pty. Ltd., 1969; new ed., 1976).

2 s. 2-6, Constitution of Australia. References to the Constitution of Australia will be to the text as found in Geoffrey Sawyer, The Australian Constitution (Canberra: Australian Government Publishing Service, 1975). It will be cited as Constitution.

The Governor General has a number of residual powers in the Constitution which, until 1975, were generally regarded as relics of colonial times. In 1975, however, the Governor General, Sir John Kerr, decided that a double dissolution of the House was necessary although the Prime Minister did not agree and would not request one. Thereupon Sir John dismissed the Prime Minister, Gough Whitlam, even though Whitlam had the confidence of the House. Sir John appointed the Leader of the Opposition as Prime Minister. That appointee did ask for a double dissolution which the Governor General granted. The fact that an unelected official, the Governor General, could dismiss a Prime Minister who enjoyed the confidence of the elected representatives was very controversial. Since 1975 there has been much talk of constitutional reform to eliminate the residual prerogative powers.

The federation contains one island state (Tasmania), five continental states (Western Australia, South Australia, Queensland, New South Wales, and Victoria) and two territories (The Northern Territory, and The Australian Capital Territory). Each has an elected legislature.[3]

The federal government consists of an elected upper and lower house: the Senate and the House of Representatives. The Senate was originally a chamber for the representation of states' interests; at federation the states had a large voice in the election of senators.[4] In addition, each state had an equal number of senators.[5] The Senate term is six years; but half the senators stand for election every three years.[6]

3 Until 1978 the Northern Territory's legislature was partly elected and partly appointed.

4 Election reform in 1949 changed the method of electing senators to statewide elections and proportional voting. Proportional voting meant that there was a greater chance for small parties and independents to be elected, as anyone who got 17 percent of the state vote was virtually assured a Senate seat. Before 1954, only one independent sat in the Senate. From 1954 to 1978, sixteen people were elected or appointed to the Senate (appointments are made to fill mid-term vacancies) from minority parties or as independents. From 1967 to 1975 the group of independents and minority party members held the balance of power in the Senate.

Proportional voting also means that parties can protect certain senators by placing their names high on the electors' list. The ability to do so acts as a subtle form of party discipline during the time Parliament is in session. See Henry S. Albinski, Canadian and Australian Politics in Comparative Perspective (New York: Oxford University Press, 1973) hereafter cited as Albinski.

5 At federation, each state had six senators. In 1949, the number was increased to ten each. In 1975, the number was again increased to provide two Senators each for the territories.

6 The fact that only half the Senate retires every three years often makes for conflict between the Senate and the House of Representatives. A new government may be elected in the House only

(cont'd)

The House of Representatives' term is three years. Members of the House are elected by constituency. At present there are 64 senators and 124 Representatives.[7]

The leader of the political party or coalition with the most seats in the House becomes Prime Minister. Depending on the party either the Prime Minister appoints a Cabinet[8] drawn traditionally from both the House and the Senate,[9] or the party caucus votes for those of its members it wants in the Cabinet and the Prime Minister assigns portfolios.[10,11]

6 (cont'd) to find itself faced with an "old guard" of the Opposition in at least half the Senate. This was the source of much difficulty when Labor Prime Minister Whitlam was elected. Albinski, p. 316.

7 Until 1949, there were 75 Representatives.

8 Strictly speaking, the Prime Minister advises the Governor General of the choices and a formal appointment is made by the Governor General.

9 It is not uncommon to have a fifth of the Cabinet drawn from the Senate: Albinski, p. 302.

10 The Labor Party uses the caucus method; Liberal-Country coalitions do not. See S. Encel, Cabinet Government in Australia, 2nd ed., (Carlton, Australia: Melbourne University Press, 1975) p. 14, hereafter cited as Encel. The caucus vote ensures that all wings of the party are represented which "enhances the Cabinet's confidence," Albinski, p. 291. It also creates problems for the Prime Minister, as far as party discipline and Cabinet solidarity are concerned.

11 Whether elected or appointed, there is a strong tradition that Cabinet members should come from all states and that the representation correspond to the size and importance of each state. When a Liberal-Country coalition governs, tradition demands the National Country Party gets 25 percent of the Cabinet positions (Albinski, p. 302), usually ministries connected with primary production such as Trade and Resources, Agriculture and Transport. The National Country Party draws its strength from the rural part of the country.

There is usually an inner group of ministers who form the Cabinet and an outer group who are not in the Cabinet.[12,13] The number of Cabinet ministers is set by the Ministers of State Act.[14]

Ministers become the political and administrative heads of government departments and can be dismissed or shifted to other departments at the Prime Minister's will. The 27 ministers are divided into subject oriented Cabinet committees.

1. The Parties and Party Discipline

There are three major and two minor political parties. The Liberal Party and the National Country Party often form a coalition government.[15]

12 A Liberal Prime Minister can decide both the number of ministers and who will be in the Cabinet. A Labor Prime Minister does not have the same power. He or she can only decide the portfolio; the party caucus decides the rest. See David Solomon, Inside the Australian Parliament (Hornsby, Australia: George Allen & Unwin Australia Pty. Ltd., 1978) p. 31, hereafter cited as Solomon.

13 Cabinet members do not reflect the occupation and education distribution of the country. This is so even though the Labor party actively recruits working-class candidates. In the last 50 years of the federation, 35 of 176 ministers had been manual workers. The Canadian number for the first 100 years is five or six: Albinski, p. 293.

14 The Constitution provided for seven ministers, but the Ministers of State Act has been variously amended to increase the number to its present twenty-seven.

15 Although there are some fundamental differences between the two (the Country Party, as the name suggests, is oriented toward rural primary producers) their dislike of the Labor Party has kept them united.

Together, they have been in power for most of the years since federation. The Australian Labor Party is the third major party; it has been in power twice. The Australian Labor Party - Anti Communist split from the Australian Labor Party in 1955. It is now called the Democratic Labor Party. A fifth party, the Australian Democrat Party, first put up candidates in 1977. In its first election, the Australian Democrat Party got more than 10 percent of the vote, and won two Senate seats.[16]

There is a strong deference to leadership in all parties, although the Labor caucus has more control of its members than the caucuses of either the Liberal or the Country party. Each party holds a weekly meeting at which ministers and the Prime Minister are asked questions. In addition, each party has several party committees which are very influential in shaping policies. The committees are continuing ones, unlike parliamentary committees which work towards producing a report. If there is a direct conflict between a party committee and the Cabinet, the Cabinet may well back down rather than face a backbencher's revolt in the House.[17]

When the Liberal and Country parties form a coalition loyalty is engendered partly by a sharing of Cabinet portfolios. In addition, when

16 Solomon, p. 90.

17 For example, in the case of broadcasting policy, the then Minister for Posts and Telecommunications was forced to redraft his own bill as a result of the party committee's position: Solomon, p. 119.

a coalition government has a thin majority (and the Liberal-Country Party coalition have governed with majorities of two[18] and seven[19]) many of the members[20] will be Cabinet ministers who are even less likely to disagree with the coalition party line. History has shown that breaches of party discipline have caused defeats; for example, in 1929 the government lost by one vote, in 1931 by five votes, and in 1941 by three votes.[21]

When a new coalition is elected, a relatively formal agenda of policies is drawn up and agreed upon by the coalition members before they take office, thus minimizing future misunderstandings.[22]

All parties use traditional sanctions against members who deviate from the party line. Members can be expelled from the party, the party can withhold its approval of a subsequent nomination in an election, or the party can refuse to place senators high on the electoral list, thereby making it very unlikely that they will be successful.

18 1961.

19 1969.

20 Usually approximately 20 of the 120 members are Cabinet ministers.

21 Albinski, p. 309. Party discipline does not reach to parliamentary committees. Members are expected to participate in a non-partisan way: Solomon, p. 87.

22 Albinski, p. 311. In some coalitions, it has been agreed that certain policies need not be supported by one or other member of the coalition. For example, in 1940 it was agreed that the Country Party need not support the Liberal policy of creating a domestic automobile industry.

The Labor Party has a more tightly organized system of discipline than the Liberal or Country parties. The Labor Party insists that each member sign a pledge that he or she will vote in the House "as a majority of the Labor Party may decide in a caucus meeting."[23] Labor Party committee meetings are more formal than those of the other two parties. There is a formal agenda, standing orders and rules for conducting meetings. Formal amendments to policy proposals can be moved and voted on. From a party committee proposals go to the full caucus. A vote of caucus binds the ministers and can overrule the direction the Cabinet is taking. Committee reports are mostly followed or adopted by the caucus.

Both the Liberal and Country parties have meetings without formal agendas or rules. The leader controls the agenda. Votes are not taken. When the Liberal and Country parties form a coalition government, then the party meetings are held jointly.[24]

Mechanisms (such as a free vote in the House) which would allow party members to express themselves without a breach of party discipline are rarely used. They are considered dangerous to party discipline and are only allowed when all parties agree that each will allow its members a free vote.[25]

23 Solomon, p. 40, quoting the pledge.

24 Ibid., p. 120.

25 Ibid., p. 39.

2. Cabinet Solidarity

The Westminster tradition of Cabinet solidarity forms part of Australian political theory. Cabinet solidarity, or collective ministerial responsibility, means that each minister must support the government's position both in public and in Parliament. If a minister cannot suppress his or her dissent, a resignation from the Cabinet must follow.[26]

Cabinet ministers take an Executive Councillor's oath of secrecy and decisions in Cabinet are taken on consensus, not on votes,[27] thus avoiding a split in a coalition Cabinet between minority and majority party members.

The theory of Cabinet solidarity does not hold up in practice.[28] In his chapter on secrecy[29] Encel notes that the oath has often been breached, usually whenever it is convenient for a minister whose position has not been accepted. Ministers quote from their predecessors' files[30] and often from Cabinet documents. Leaks from the Cabinet

26 See Kenneth Kernaghan, Freedom of Information and Ministerial Responsibility (Commission on Freedom of Information and Individual Privacy, Research Publication 2, 1978), hereafter cited as Kernaghan.

27 Albinski, p. 304.

28 Solomon, Albinski and Encel all make this point.

29 Encel, chapter 14, passim.

30 The British tradition holds that a new government of a different party cannot look at or use the ministerial files of a previous government: Encel, p. 4.

room itself are very common.[31] Whether this is proper, and if so in what circumstances, has been frequently debated. For example, in 1916 Cabinet minister W.G. Higgs defended his referring to part of a Cabinet meetings by saying

> we were loyal to the Prime Minister until he was disloyal to us ... does [the Minister who raised the question] suggest that ministers, because they have an oath of secrecy, are bound to cover up every act of every colleague? I take it that each minister is the judge of what he should disclose and must take responsibility for his actions. 32

Various Prime Ministers have tried to prevent leaks by encouraging their ministers to abide by the rules of Cabinet solidarity. In guidelines for his ministers, Prime Minister Menzies stated

> it would be a sound practice if no reference be made to cabinet files except for the purpose of (a) discovering what operative decisions have actually been made; (b) ascertaining the content of communications in fact made between the government and outside persons or authorities. 33

The references did not stop, however. Minister have used Cabinet information to make public statements on the Suez crisis,[34] on advice

31 Solomon notes that when devaluing the currency was discussed for three days in 1971, each day's newspaper contained stories on the various sides taken during the Cabinet discussions. The information was based on briefings by ministers and their staff: Solomon, p. 175, ff.

32 Commonwealth Parliamentary Debates (hereafter cited as C.P.D.) 80:9280, cited in Encel, p. 126.

33 C.P.D. 171:206, 933 and 1145-6, cited by Encel, p. 127. This appears to be at least a tacit acceptance that Cabinet papers are not inviolable, and that at least decisions should be made available.

34 Encel, p. 127.

tendered by the chiefs of staff,[35] and on decentralization.[36]

Political commentators suggest various reasons for breaches of Cabinet solidarity. Solomon suggests that in the Liberal-Country Party coalitions, the Country Party, as the smaller member, is always anxious that its rural constituents know it is not associated with government decisions which do not favour primary industries.[37] Liberal ministers, when discussing a controversial matter, have returned to their constituencies to say they personally were not associated with a government decision which may have adverse consequences for the constituency.[38]

As for the Labour Party, Albinski[39] states that caucus selection of ministers weakens Cabinet solidarity. A minister who does not like a Cabinet decision can appeal to the Labor caucus.[40] Thus, Cabinet matters are discussed freely in caucus as ministers lobby for the support of backbenchers. Leaks appear inevitable.

35 Ibid., p. 129.

36 Ibid., p. 131.

37 Solomon, p. 175, ff.

38 Ibid.

39 Albinski, p. 291, ff.

40 See the earlier section of this paper on "The Parties and Party Discipline," p. 145.

There have been four resignations over breaches of Cabinet solidarity.[41] Two ministers were forced to resign over remarks they made which breached Cabinet secrecy,[42] and two resigned because they were unable to support certain Cabinet policies.[43]

Although journalists are happy with leaks from the Cabinet room and quotations from various Cabinet documents, this kind of behaviour has been criticized. While authors generally condemn the secrecy followed by the government, Spiegelman points out that leaks mean the government can manage the news by timing the leaks in such a way that the information presents the government in a favourable light.[44]

41 S.E. Finer, in his article, "The Individual Responsibility of Ministers," found that in Britain, over a century, only 20 resignations occurred. These resignations were both for breaches of Cabinet solidarity as well as for maladministration.

42 Mr. Leslie Buey resigned in 1961 after making a speech in which he said Britain's entry into the Common Market would not affect Australia. At the time, the Cabinet was negotiating for trade concessions on the very basis that Britain's entry would substantially affect Australia. In 1971, John Gorton, six months after being defeated as Prime Minister, complained in a public article that ministers leaked information. Prime Minister McMahon regarded this attack on ministers unfavourably, and requested a resignation: Solomon, p. 174.

43 In 1971, Malcolm Fraser resigned because he said Gorton, then Prime Minister, had been disloyal to him and was unfit as a Prime Minister. In 1977, Bob Ellicot, the Attorney General at the time, resigned because he could not support the Cabinet's wish that he take over a private prosecution against a former Prime Minister for the purpose of later withdrawing the prosecution. In addition, Ellicot disagreed with the Cabinet's decision to claim Crown privilege and parliamentary privilege for certain crucial documents in the case. Solomon, p. 175.

44 J.J. Spigelman, Secrecy: Political Censorship in Australia (Sydney: Angus and Robertson, 1972) referred to by Encel.

3. Individual Ministerial Responsibility

The timed leak also interferes with individual ministerial responsibility.

> The traditional doctrine of individual ministerial responsibility has two major components, namely:
>
> 1) the minister is answerable to the legislature in that he must explain and defend the actions of his department before the legislature, and
>
> 2) the minister is answerable to the legislature in that he must resign in the event of serious personal misconduct. He is also answerable for the administrative failings of his departmental subordinates in that he must resign in the event of a grave error by his department. "The act of every Civil Servant is by convention regarded as the act of his Minister." (Sir Ivor Jennings, Law and the Constitution, London, University of London Press, 1952, 4th ed., pp. 189-190). 45

Thus a leak of only partial information permits a minister to avoid complete responsibility by ensuring that only favourable information is leaked. Without a full grasp of the facts, Parliament cannot properly question ministerial or departmental activities. A minister may base a refusal to give additional information on the doctrine of Cabinet solidarity, even if that minister has tacitly approved the leak of partial information.[46]

> It undermines the whole notion of ministerial responsibility for policy and administration. In an atmosphere of secrecy ...

45 Kernaghan, pp. 7-8.

46 Partial leaks are only one difficulty. As Peter Shore has pointed out, any kind of secrecy makes it more difficult to enforce ministerial responsibility. Peter Shore, Entitled to Know (London: Macgibbon and Kee, 1966).

> the mythology of responsibility prevents the actual enforcement of responsibility in those cases in which a minister was or should have been involved in a decision-making process. [47]

Even apart from leaks, the traditional notion of ministerial responsibility is simply not followed in Australia.[48] Encel refers to numerous examples of extravagant misuses or errors in judgment which have either not resulted in resignations or have resulted in resignations and reappointments to the same portfolio six months later.[49] A former parliamentary reporter concluded, "the principle of ministerial responsibility cannot be regarded as a constitutional remedy for mismanagement."[50]

Several resignations have occurred over the principle of individual ministerial responsibility, but most of these have centered around the issue of whether a minister has misled parliament. By and large, if caught out, a minister will simply admit an error and take corrective action, but will not resign. In practice, a minister is responsible

47 Encel, p. 132, interpreting J.J. Speigelman's views in Secrecy: Political Censorship in Australia, op.cit.

48 Encel, chapter 13, passim.

49 Encel, p. 116. These include the Minister for Air, Peter Howsen, who stated that documents did not exist when in fact they did; the Deputy Prime Minister, Cairns, who apparently misled Parliament over a promise to pay a loan commission; and the Minister for Minerals and Energy, who was less than frank concerning negotiations for an overseas loan and his authority for continuing those negotiations. See Solomon, p. 177, ff.

50 Solomon, p. 177 ff.

to the Prime Minister and then to his party for his performance as a minister.[51]

Solomon believes that the tradition will continue to erode, particularly as administrative work becomes more and more complicated and departments are less and less directly administered by ministers. The focus of responsibility will continue to be on ministers, but the locus of responsibility is increasingly civil servants.[52]

> In practical terms, individual ministerial responsibility has come to mean what a minister must do to retain his own job, while [Cabinet solidarity] refers to what he must do to help keep the government as a whole in office. [53]

4. The Work of the House and the Senate

The legislature sits, on average, sixty days a year and in some rare years it has sat seventy-five days.[54]

Legislation (except money bills)[55] may originate in either chamber but

51 Ibid.

52 Kernaghan, p. 26.

53 Solomon, p. 182.

54 Contrast the Canadian federal legislature which sits about 190 days a year and has on occasion sat 250 days.

55 Only the House can originate money bills: Constitution, s. 53. Neither the Senate nor anyone other than a minister in the House

(cont'd)

must be passed by both. If there is a deadlock[56] the Constitution provides for a special joint session where each representative's vote counts as one.[57] The larger House can therefore outvote the Senate. Failing such a vote, the government can ask for dissolution of both chambers and a special election will be called.[58,59] The House will also be dissolved if the government fails to survive a non-confidence motion or if the Senate blocks a supply bill.

The Senate can be particularly difficult for a Prime Minister when the majorities in the two chambers are not complementary.[60] The Senate

55 (cont'd) can move amendments which would increase spending or the charges set out in government money bills. The Senate can ask the House to amend but cannot do so itself. To prevent the Senate's being bypassed in areas other than money bills, ss. 54 and 55 of the Constitution require that money bills contain only provisions related to the issue of money, be it customs or excise or supply. In other words, the Constitution prohibits tacking on amending sections which have nothing to do with money bills and which the Senate would then not be allowed to amend.

56 A deadlock is reached when the Senate has twice rejected a bill, has failed to act on a bill, or has passed amendments unacceptable to the House.

57 Australian Constitution, s. 57.

58 Ibid.

59 During Labor Prime Minister Whitlam's tenure (1972-75), there were two double dissolutions and one joint sitting -- the first joint sitting.

60 During Prime Minister Whitlam's tenure, the Senate, controlled by a Liberal-Country coalition, was particularly intransigent. In those three years, it rejected more bills than during its previous 71-year history. Eventually, the Government was dismissed by the Governor General and elections were called.

can[61] -- and has -- forced legislation on the government.[62] Partly as a result of the tension between the party strengths in the two chambers, the Australian Senate appears to take a much more active role in policy making than does the Canadian Senate.[63] In Australia, senators form about 20 percent of the Cabinet. Party discipline imposed on House members also reaches the senators.[64]

a) Private Members' Bills

Private members' bills are rare. Those which are introduced are usually introduced in the Senate where, because the chamber is smaller and the rules of procedure different, they may be properly debated and may even pass. House rules and standing orders are heavily weighted against private members' bills. Such bills can be discussed for thirty minutes once every two weeks. If they are not then disposed of, they go to the bottom of the legislative list, from whence they rarely reappear.

61 The Senate can also pass a motion of no confidence in a specific minister who must then give up the portfolio. This power has not yet been used: Solomon, p. 23.

62 For example, when Democratic Labor Party senators held the balance of power, they insisted on legislation which imposed strict penalties on those who collected money for North Vietnam or for the Viet Cong: Albinski, p. 321.

63 The Australian Senate is also to act as a watchdog over the Executive, pointing out silly and improper behaviour, such as the use of VIP airplanes for personal business at public expense: Albinski, p. 335.

64 The incentive of becoming a minister reinforces party discipline: Albinski, p. 316.

Private members' bills do, however, serve two useful functions. For the government, they can be used on conscience issues when it does not want to impose party discipline.[65] For the opposition, they can attract publicity and can embarrass the government.[66]

Only three private members' bills have even become law: a 1901 bill on arbitration; in 1924 a bill making voting compulsory; and in the early 1970s a family law reform bill.

b) The Question Period

There is a daily question period in both chambers[67] but it is heavily weighted in favour of the government. There is no requirement that questions be answered;[68] ministers do evade.

65 The government used this procedure for the Family Law Bill, which was introduced as a private member's bill by the then Attorney General, Senator Murphy. For this bill, however, special treatment was arranged and a special amount of time for debate in both the House and the Senate was set aside. Ultimately the bill passed.

66 Such was the case with a private member's bill to lower the voting age to 18 (it passed the Senate but failed in the House); and for the abolition of capital punishment for crimes in the territories (it also passed the Senate but failed in the House).

67 The volume of questions can be enormous. In 1971, 3,886 questions were asked in the House, two-thirds on notice. The Senate had a proportionate number, but only one-third were on notice. Encel, p. 148.

68 In the early days of the 1970s, the government (Liberal-Country Party) began referring the questioner to the source material rather than (cont'd)

"The Opposition rarely succeeds in inflicting political damage on the government during question time."[69] Each question from the Opposition is followed by one from the government back bench. The government questions are friendly and ministers can partly run out the question period time by declaiming on the benefits and wisdom of their policies and by attacking the Opposition.[70] The Standing Orders also favour the government at question time because "they forbid questions to contain arguments, inferences, imputations, epithets, ironical expressions or hypothetical matter; questions may not ask ministers for an expression of opinion, any announcement of government policy, or a legal opinion."[71] As oral questions rarely elicit much information, Opposition members often put their questions "on notice." There is no limit to the number which may be asked. Each is printed in a daily notice paper every day until it is answered. Some questions are printed daily for several years until they are answered.[72]

68 (cont'd) producing the answer itself. Solomon points out that a favourite evasion tactic is to answer only part of a question. While holding the floor, the minister then adds information praising the government and criticizing the Opposition. Alternatively, the minister can ask that the question be put on the order paper.

69 Solomon, p. 24.

70 If ministers answer by reading from documents, the Opposition can ask that the documents be tabled. The minister can refuse on the ground that they are confidential. There is no review of a minister's statement on confidentiality.

71 Ibid., p. 64.

72 Ibid., p. 53. Solomon points out that Prime Minister Whitlam was one of the first to use questions on notice effectively. When in opposition, he gathered plentiful statistics on many major policy (cont'd)

Information sufficient to draft questions is often hard to obtain. Only the government can ask the civil service to prepare information; thus the government is always in a superior position of knowledge.[73] Preparing questions, however, is now slightly easier than it was before, since the Parliamentary Library now has a legislative reference service. Although it is widely used, its staff and resources are modest.[74] The service is used mostly for assembling existing knowledge rather than ferreting out new information.[75]

c) The Committee System

The committee system is not as well developed as it is in Sweden or the United States. "There is less disposition to delegate authority in the Australian Parliament, therefore the committees have less

72 (cont'd) issues such as transport, northern development and the like. In the next election campaign, Whitlam's party was able to use this information with great effect.

73 An exception was the "loans affair," when a senior Treasury official was briefing the opposition; thus the opposition had more information than even the Prime Minister did, as ministers were unwilling to tell the Prime Minister the complete story. The "loans affair" referred to a controversy over whether ministers were borrowing money abroad without the statutory authority to do so. Solomon, p. 54.

74 Albinski, p. 323.

75 Solomon, p. 24.

responsibility."[76] Nonetheless, the House and Senate each have Select and Standing Committees. The House committee system is rudimentary, and little policy-making goes on there.[77] The Senate system contributes more to the policy-making process.

i) The Senate System

The Senate committee structure is comprehensive, and some committees have become powerful. Both legislation and policy issues can be referred to Senate committees. A committee can call witnesses and can require documents. Ministers must attend if summoned. They are often subjected to searching cross examination. The proceedings can be closed according to the chair's decision. Each committee has a full-time secretariat; an innovation which dates from the early 1970s.[78]

The Senate's system was developed in the early 1970s as a result of certain senators' desire to have more power and to change the image of the Senate from that of an old man's club. The majority party in the

76 Personal interview. Australian High Commissioner to Canada, John E. Ryan with Research Assistant Audrey Bayduza, Ottawa, December 1979.

77 The government agreed to try a new enlarged system for the House starting in 1978: Solomon, p. 87.

78 Albinski, p. 289.

House was suspicious of these reforms but did not have enough strength to block them.[79]

Following the reforms, the Senate committees have provided some landmark reports,[80] which have led directly to policy reforms. Some committees have played an overseeing role in the area of delegated authority such as regulation-making. Occasionally the committees have exposed improper regulations and have had them disallowed.[81]

ii) The House System

House committees have usually been housekeeping committees. A few select committees, and four House-Senate joint committees,[82] have been

79 Albinski, p. 334. Two proposals for reform were accepted. One created seven standing committees to review legislation in various subject areas and the other created five special standing committees to review various aspects of the budget estimates: Solomon, p. 84. For an interesting discussion of the moving force, Senator Lionel Murphy's strategy tactics and personal aggrandizement, see Solomon, p. 80, ff.

80 These include Australian television production, air and water pollution, securities and exchange regulation, and freedom of information: Albinski, p. 335, ff.

81 Albinski, p. 338. Upon recommendation of the Committee on Regulations the Senate can nullify any regulation or ordinance within 15 sitting days after its approval by the Governor General.

82 These include one on each of the Australian Territories, the Public Works Committee, the Public Accounts Committee, and the Foreign Affairs Committee. Even when a possibly powerful joint committee (Public Accounts, Foreign Affairs) has been formed, it is usually (cont'd)

struck. House committees are not powerful and have not had much influence on policy-making. To take a typical year, in 1971 only 34 of the 140 bills which were passed in the House were discussed in committee.[83] Of the rest, 17 were amended in committee but only three amendments were accepted.[84] During the same period in the Senate 91 amendments were proposed, of which 31 were accepted.[85]

As has been noted, the stronger Senate system of committees developed as a result of reforms instituted by the Senate itself which the majority parties were not strong enough to block. In the House, however, the majority parties were strong enough to block reforms. Both Liberal-Country Party coalitions and the Labor Party seemed suspicious of strong committees.

Albinski sums up the conflicting moods:

> Governments tend to harbor suspicions of powerful and independently minded committees even when their parliamentary majorities are clear and secure. They do not wish to have their pre-eminence in policy making usurped or their

82 (cont'd) hindered in some other way. For example, only a minister can decide to review or refer a matter to the Foreign Affairs Committee. The minister can require the meetings to be held in camera and can require members to take an oath of secrecy about the proceedings Albinski, p. 333.

83 Although the House Standing Orders require a committee stage, the government can move to suspend the orders whenever the committee stage is thought to be unnecessary and no member objects.

84 G.S. Reid, in Wilkes (ed.) Who Runs Australia? (Sydney: Colan 1972), hereafter cited as Wilkes.

85 Ibid.

> legislative programs potentially diluted by inconvenient amendments or to be subject to embarrassingly searching criticism. They are wary of institutionalized committee forums through which serving government members might acquire excessively independent habits, or serving opposition members acquire publicity for their anti-government expositions. On the other hand, a committee system which has powers subject to prescribed limitations can be advantageous to government. It can calm restless parliamentarians who otherwise feel isolated and neglected. It can help to obviate criticisms that governments are arbitrary and dictatorial. If properly organized a functioning committee system can streamline a legislative process relieving the legislature of some tiresome and inefficient activity. Also within limits it can serve as a source of reasonable ideas which can improve legislation without actually emasculating it and/or make legislation more palatable to the governing party or certain organized interests. 86

In 1978 the government instituted some reforms by creating additional House committees.[87] It remains to be seen whether new structures will have a significant influence on policy making.

5. The Bureaucracy

Civil servants are extremely influential in the policy-making process.[88] As the tasks of government become more complex, ministers have tended to rely on their civil servants' expertise. Their place as experts is

86 Albinski, p. 329.

87 Solomon, p. 87.

88 At present, one in twelve Australians works for the commonwealth or state government.

maintained by a virtual monopoly on information. There is no mechanism which can challenge this power base.[89]

> The growth in size, strength, and influence of permanent officials has reduced the capacity of ministers, not to mention parliament, to control policy. [90]

The institutional structure, which requires departments to compete for resources, encourages information control which is useful in maintaining powerful and influential positions. Official secrecy excludes competing sources of knowledge and advice.

The doctrine of ministerial responsibility leads ministers to form a joint front to maintain a monopoly on their departments' information as there is a mutual interest in concealing the contribution each makes to policy formulation. In fact, "the general quality of parliamentarians and ministers is now far behind that of their official advisors."[91] Spiegelman, however, suggests that the quality of civil servants might well be judged harshly if more accountability was possible. "If the eminences gris were no longer gris they might be seen to be very much less eminent."[92]

89 Parliament, which sits usually for 60 days a year, finds other things more important. Parliamentary committees are too weak to question information presented by civil servants.

90 E.A. Lyle, "Knowledge and Power" in Wilkes, op.cit., p. 109.

91 Encel, p. 192, ff.

92 Quoted by Solomon, p. 149.

As reliance on civil servants for advice has grown their anonymity has decreased, particularly in the senior ranks. Senior staff often appear at parliamentary committees to answer questions. They discuss their minister's points of view with other ministers and with party members, and often brief party committees. Civil servants' awareness of politics has necessarily increased. The idea of a non-political (as contrasted to an impartial) civil service especially at the senior levels is not the reality. For example, in its testimony to the Royal Commission on Australian Government Administration, the Department of Urban and Regional Development said that there were areas of

> policy advice to ministers in which a party political flavour cannot be avoided. It would be unrealistic to suggest the concept of an apolitical public service implies unawareness of political constraints ... By definition, government employees service governments. They do not serve the parliament nor do they serve "the people." 93

As Solomon notes, there are no rules governing the relationship between senior bureaucrats and their ministers. Their advice often takes into account political situations as well as general administrative policy. Ministers often accept their departments' advice entirely, although they are not obliged to accept any of it.

> The department's views carry great weight if for no other reason than the department has the most information ... There is no doubting the potential political power of very senior public servants and the actual power that many of them exercise. 94

93 Quoted by Solomon, p. 149.

94 Solomon, p. 147.

As a result of civil servants' increasing exposure, Prime Minister Fraser issued guidelines in 1976 for bureaucrats' behaviour when dealing with individual MPs, Senators, and party committees. Two points are of note:

> Care should be taken to avoid unauthorized disclosure of classified or otherwise confidential information for example, where a breach of personal or commercial privacy could be involved.
>
> Officials will not be expected or authorized to express opinions on government policies, policy options, or matters of a party political nature. The discussion may, however, include administrative arrangements and procedures involved in implementation of the proposed policies or legislation. 95

Increasing politicization and exposure has led civil servants to have a higher personal stake in various policy options. Partly as a result, there have been an increasing number of leaks to the media and to the opposition parties.[96]

The monopoly on information, the high personal stake in certain policy advice, and the lack of oversight means that civil servants' work "probably has more important political effects than the work of parliamentary or ministerial staffs."[97]

95 Ibid., p. 150.

96 Ibid., p. 151.

97 Solomon, p. 146. There is also a certain jealousy among parliamentary, ministerial and departmental staffs for "access to the master's ear": personal interview, Australian High Commissioner with Research Assistant Audrey Bayduza, December 1979.

6. Committees and Commissions

Within the bureacracy interdepartmental committees[98] are sometimes struck. The committees' advice or reports are not always available to the public,[99] but are viewed as important and influential documents in the policy-making process.

Occasionally, independent task forces or commissions of inquiry will be created. For more controversial issues, royal commissions may be used to investigate and report.[100] Membership on royal commissions

98 Encel classifies these interdepartmental committees as follows:

a) ad hoc bodies commissioned by the Cabinet or committee of Cabinet to examine a policy question and report back. An example is the Sulphuric Acid Committee.

b) Standing bodies with administrative duties such as the Overseas Visits Committee which regulates visits of officials to other countries.

c) Standing bodies with mixed duties of policy formulation and administration of decisions reached at the ministerial level such as committees dealing with economic questions such as employment, overseas trade, export control and the like.

d) Advisory bodies containing non-governmental members such as the Export Development Committee, the Industrial Research and Development Grants Board and the Manufacturer's Industries Advisory Council. See Encel, p. 195.

99 A notable exception is the interdepartmental committee report which led to the Freedom of Information Bill. Attorney-General's Department, Proposed Freedom of Information Legislation: Report of Interdepartmental Committee (Canberra: Australian Government Printing Service, September 1974).

100 In recent times there have been royal commissions on government administration, on the collision of two naval vessels, on the economic situation and on espionage.

includes politicians, bureaucrats and non-government people. Their procedures are similar to Canadian royal commissions: they may hold public hearings; they may receive briefs or they may commission research; they deliberate in closed sessions; their reports are usually made public but do not always lead to change.

7. Public Participation

Public hearings by commissions of inquiry and testimony before parliamentary committees are the only formal mechanisms for public participation in Commonwealth decision making. Outside these arenas, special interest groups, such as the Consumers' Association of Australia, do exist. Their influence, if any, comes from their lobbying the government and creating public support for policy changes they believe desirable.

Organized producer groups also participate in policy formulation, both through their trade associations and through advisory councils such as the Immigration Advisory Council and the National Labour Advisory Council.

In some areas of public controversy such as urban planning, the government will usually consult with people who may be affected before a final decision is made.

It is difficult to judge the amount of influence any of the groups have on the government.

8. The Media

Journalists are the main conduit of information about the government. They are courted by politicians with both desire and fury.[101] "Backbenchers complain that political correspondents ... have better access to ministers and that they have more power than ordinary parliamentarians."[102]

However, the timing of media deadlines and particularly the demands of television for short stories means that journalists present little analysis. Thus, the press is only sporadically a knowledgeable critic of the government. In addition,

> few journalists have the knowledge and expertise to scrutinize specialized issues in depth and to draw public attention to fallacies, errors and injustices in the formulation of policy and its execution ... The role of the press as an instrument of accountability is strictly limited and it is idle to pretend

101 On occasion when the media has been unfavourable, politicians have tried to retaliate. For example, Prime Minister Gorton abolished regular press conferences and Country Party leader McEwan once persuaded the Attorney General to conduct a raid on a journalist's house. The journalist successfully sued for wrongful police action and the Attorney General resigned: Encel, p. 150 ff.

102 Solomon, p. 162.

> as some do, that it has largely taken the place of parliament. Its decline in effectiveness is a net loss for which no replacement has been found. [103]

Critical articles are sometimes suppressed because publishers believe it is in their interest to get along with the government of the day,[104] and some newspapers are biased toward one party.[105]

The laws and habits of secrecy lead journalists to take advantage of unofficial sources to get information. As has been noted, although bureaucratic interests favour secrecy, political interests in popular or backbencher support mean that senior politicians may reveal what they have sworn not to in order to disassociate themselves from a disliked policy. Journalists exploit these desires.[106,107]

103 Encel, p. 152, ff.

104 Ibid., p. 152.

105 Solomon, p. 161.

106 For example, for many years one of the best sources of stories was the weekly political party meetings. The party members were not supposed to reveal anything that went on at these meetings but in fact they routinely briefed journalists in order to ensure publicity for what they favoured. Finally, the Labor Party in 1967 and the Liberal Party in 1973 began to provide official briefings of what went on at the meetings. Journalists were not prepared to accept the officials' briefing and checked information with those who had been at the meeting. The upshot was that journalists' stories emphasized the issues which had been omitted or played down in the official briefing: Solomon, p. 158 ff.

107 Spiegelman has noted that this kind of information-gathering means "the system [of accountability] only works when it breaks down." Cited by Encel, p. 151.

Although journalists monitor government behaviour just as closely as their counterparts do in Sweden, they have nothing like the rights of access to information that Swedish journalists do. Thus they may often convey only part of a story or they may miss an important one altogether because they cannot get information. A journalist's role in stimulating informed public discussion is limited by the constraints of secrecy.

9. The Ombudsman

The office of Ombudsman was created in 1976.[108] Under the statute, the Ombudsman is not an officer of Parliament, but rather reports to the Prime Minister. As in Sweden, the Ombudsman has wide powers to investigate administrative actions, but cannot investigate ministerial actions. The results of any investigation are sent to the complainant and the department concerned along with the Ombudsman's recommendations. Usually a department accepts the recommendation and carries it out.

A leading cause of complaints to the Ombudsman has been failure to comply with the Administrative Decisions (Judicial Review) Act.[109]

108 Ombudsman Act, Act No. 181 of 1976. Most of the information on how the Ombudsman functions is taken from personal interviews by Research Assistant Audrey Bayduza with Mike Seale, Press Officer at the Australian High Commission, Ottawa, during December, 1979.

109 Act No. 59 of 1977.

That Act requires official decision-makers, upon the application of any concerned person, to furnish a written statement setting out findings on material questions of fact as well as reasons for the decision which has been made. Many departments have asked to be excluded from the statute, saying that confidential information would be revealed if written reasons for decisions were required.[110] Others have simply not complied: "There [have been] too many instances of members of the public not being given the real opportunity to seek an explanation of action direct from the department or authority concerned."[111]

The Ombudsman's office is only a few years old.[112] Questions concerning its jurisdiction are still being debated.

110 Canberra Times, Nov. 19, 1979.

111 Canberra Times, Nov. 16, 1979.

At present, the Ombudsman's role in securing access to government information for complainants is limited because there is no freedom of information legislation. A bill has been introduced, under which the Ombudsman could only investigate delays in answering requests. It is too early to say whether the Ombudsman's role will evolve to the extent that he can, by moral suasion, strongly encourage greater access, as the Swedish Ombudsman does.

112 The Ombudsman's annual reports show the following statistics:

	First report/1977-78	1978-79
Number of complaints	2,656 written	2,680 2,589 completed
Resolved in favour complainant	243	667
Resolved in favour department	485	967*
Lapsed or withdrawn	103	169
Investigation refused	199	343
Outside ombudsman's jurisdiction	not available	443

* In 260 of these, the Ombudsman obtained the first explanation of a decision for the complainant.

B. The Law

At present there are no laws which authorize disclosure of information; there are only laws which prohibit it. A freedom of information bill was introduced in 1978,[113] but Parliament has not passed it. The Royal Commission on Australian Government Administration, established in 1974, discussed the issue but did not make recommendations. Nonetheless a minority of the Commission drafted a report including a proposed freedom of information statute.[114] It is referred to as the Minority Report Bill.

The freedom of information issue came to prominence when the Labor government was elected in 1972. Reform of government administration, openness and participation had all been part of the election campaign. Accordingly, the Labor government set up an interdepartmental committee to consider how legislation such as the U.S. Freedom of Information Act could be adapted to the Australian constitutional context. The report was published in September, 1974.[115] The government did not take action on the report before it was dismissed in 1975. The new government

113 Freedom of Information Bill, 1978.

114 Report of the Royal Commission on Australian Government Administration (Canberra: Australian Government Publishing Service, 1976). The draft statute is at p. 237, Appendix 2.

115 Attorney-General's Department, Proposed Freedom of Information Legislation, Report of Interdepartmental Committee (Canberra: Australian Government Publishing Service, September, 1974).

reconvened the Interdepartmental Committee which issued a second report in November, 1976.[116] The Minority Report Bill appeared in 1976 and the government's bill in 1978. The government's bill was based largely on the Interdepartmental Committee reports. It strives to preserve a traditional view of ministerial responsibility[117] and executive control of access to information. The government's bill was much criticized, both in the press and by academicians. A public interest group called the Freedom of Information Legislation Campaign Committee began a campaign for amendments. The government then referred the bill to the Senate Standing Committee on Constitutional and Legal Affairs, together with a proposed archives bill. That committee reported in November 1979.[118]

It is not yet known what changes, if any, the government will make to its bill. Thus the subsequent discussion will refer only to the government's proposed bill, as of 1978, and the Minority Report Bill. The effect each would have on access to information during the policy-making process will also be discussed. Before turning to these bills,

116 Parliament of the Commonwealth of Australia: Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee, November, 1976, Parliamentary Paper no. 400/1976, (Canberra: Australian Government Publishing Service, 1977).

117 See infra, p. 149 ff for a discussion of ministerial responsibility in Australia.

118 Parliament of the Commonwealth of Australia: Freedom of Information Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill, 1978, and Aspects of the Archives Bill, 1978 (Canberra: Australian Government Publishing Service, 1979).

however, it is useful to consider the existing legislation which restricts disclosure.

1. Statutes Preventing Disclosure

The most far-reaching statute which prevents disclosure is the Crimes Act.[119] Section 70 prohibits present or former Commonwealth officers from disclosing any fact or document which comes to their knowledge or comes into their possession by virtue of their office, where it is their duty not to disclose. The penalty is two years in jail. Although there have been few prosecutions in Australia,[120] the act has been criticized as creating a serious chilling effect on disclosure.[121]

The Public Service Act[122] in Australia states that a public servant can be charged under section 55(1) for breaching regulations under that statute. Regulation 35 provides that an officer shall not disclose information which comes to his or her knowledge in the course of his or her duty without permission of the chief officer.

119 Crimes Act, Act No. 12 of 1914 and amendments.

120 The Senate Committee noted that there had been only one reported use of the section in 1971 (Committee Report, p. 238, para. 21.15).

121 See, for example, John McMillan, "Freedom of Information in Australia: Issue Closed," 1977, 8 Federal Law Review, 379, at 391 ff., hereafter cited as McMillan.

122 Act No. 21 of 1922 and amendments.

Other more specific statutes also prohibit disclosure of information gathered or prepared during the administration of statutes such as the Income Tax Assessment Act,[123] and the Atomic Energy Act.[124] Some statutes restrict publishing information as for example the Federal Court of Australia Act,[125] and the Administrative Decisions (Judicial Review) Act.[126] Each of those statutes gives a court authorization to prohibit publication of the names of witnesses or evidence if it is necessary to prevent prejudice to the administration of justice or the security of the Commonwealth. Other statutes such as the Broadcasting and Television Act,[127] allow meetings of regulatory agencies to be held in private and their minutes or transcripts withheld. Subordinate legislation can also contain provisions forbidding disclosure.

2. Freedom of Information Proposals

The Government's Bill v. The Minority Report Bill

Both the government's freedom of information bill and the Minority Report Bill give any person a right of access to government-held

123 Act No. 27 of 1936.

124 Act No. 31 of 1953.

125 Act No. 156 of 1976.

126 Op.cit.

127 Act No. 33 of 1942.

documents, with some exceptions. The two bills differ in the extent to which they create a right of access; it is generally agreed that the Minority Report Bill would give wider access. The Minority Report Bill attempts to define the exempting provisions more narrowly and more precisely by qualifying each exemption by adding a list of documents which are deemed not to fall within the exemption. (X is exempt from access but X_1, X_2, and X_3 are exempt from the provisions governing or defining X.) The amount of discretion left to the Executive in implementing the bill is thus reduced. Such discretion as remains under these provisions is to be reviewed by the Administrative Appeals Tribunal. The government's bill, on the other hand, does not permit external review of a decision to withhold in some circumstances. If a minister certifies that a document is exempt because it contains national security, defence, international relations information, is a Cabinet document (including a decision) or is an Executive Council document, the certificate is conclusive. There is no possibility of review. Conclusive certificates preventing review of such high policy information are justified on the basis of "the proper role of Ministers ... as the elected government."[128] The justification interprets the doctrine of ministerial responsibility in a way which permits wide Executive discretion to deny access. One might have thought that a major virtue of access legislation was to reduce the scope of ministerial discretion to deny information, but the Australian government has chosen otherwise.

128 The Parliament of the Commonwealth of Australia, the Senate, Freedom of Information Bill 1978, Explanatory Memorandum (Canberra: Australian Government Printing Services, 1978).

a) Basic Provisions

Both the Minority Report Bill and the government's bill require certain material to be published and certain other material to be indexed.

Both require that a description of each department's and organization's functions, decision-making powers and consultation mechanisms be published.[129] The government's bill requires an index of "categories of documents" be published in "a form approved by the minister,"[130] whereas the Minority Report Bill requires an index of "general classes or types of documents" be published.[131]

Both require that secret law be made available,[132] but the government's bill gives a 12-month period from the date the Act comes into force before such material must be available. Both sections allow for the severability of exempt secret law material.

The Minority Report Bill contains more detailed requirements for each publication. It is thus more likely to lead to uniformity and comparability among government departments. The Senate Report

129 Government bill s. 6, Minority Report Bill (MRB) s. 23.

130 s. 6.

131 s. 23.

132 Government bill s. 7, MRB s. 24.

recommended that publication requirements in the government bill be widened to include a number of Minority Report Bill details, such a list of facilities provided for physical access, basic information about freedom of information legislation, and avenues for participation in government policy formulation and decision making.[133]

Both bills require that a request be made in writing.[134] The Minority Report Bill is retrospective whereas the government's bill would not apply to documents created before the bill comes into force unless such documents were reasonably necessary for the understanding of a document which was covered.[135] Both bills define "document" to include information regardless of its physical manifestation. However, the government bill restricts some forms of access. The government can refuse to give access in the form requested if it would "unreasonably interfere" with the operations of the department.[136] In addition, access will not be given in a form which will infringe copyright[137] and access can be deferred until a particular event occurs or a specific period elapses if a minister decides that such would be in the public interest.[138] None of these limitations on the right of access are

133 Senate Report, p. 90. para. 7.14 and 7.16.

134 Government bill s. 13, MRB s. 4(8), 5(1).

135 s. 9(2).

136 s. 18.

137 s. 18(3)(c).

138 s. 19.

contained in the Minority Report Bill.

Both bills define the kinds of government agencies to which the statute will apply. The definitions are broad, but neither bill applies to the judicial or legislative branch of government. The government bill gives a power by regulation[139] to specify bodies or agencies which will not be covered. The Minority Report Bill does not permit this method of exempting government entities.

Both bills contain time limits within which an answer must be given to a request. The government bill's time limit is 60 days,[140] whereas the Minority Report Bill's time limit is ten days with a possible extension of an additional ten days if there is difficulty in finding the material.[141] Both bills deem the government to have refused if no answer is given within the time limit.

If a request is granted, then the information must be made available in an understandable form. If the request is refused, then each bill provides for notice to the applicant. The government's bill requires a notice which will include reasons.[142] When some information has

139 s. 5.

140 s. 17(b).

141 s. 9(3),(4).

142 s. 19.

been deleted from a document, the applicant must be informed why[143] and an applicant must be told of his or her rights to appeal.[144] The Minority Report Bill requires reasons for the refusal including a specific reference to the section of the bill which authorizes refusal, the name, position or rank of the person making the refusal, the availability of review, and the name of the person to whom such review application should be made.[145]

Both bills allow for internal review. The Minority Report Bill requires an application to be made within 30 days of refusal,[146] and gives the agency 15 working days to decide on the application.[147] The government's bill requires internal review when a decision to refuse has not been made by the head of the agency.[148] This application must be made within 28 days of refusal, and the agency has 14 days within which to reply.[149] Both bills permit a further appeal to the Administrative Appeals Tribunal, a new body set up under the Administrative Tribunals Act, 1978.

143 s. 20(2).

144 s. 22(1).

145 s. 9(7).

146 s. 12(2).

147 s. 12(3).

148 s. 38(1).

149 s. 38(2).

Both bills place the burden of proving that refusal was justified on the government.[150] The government's bill, however, fetters the jurisdiction of the Administrative Appeals Tribunal. Section 37(3) states that the tribunal cannot exercise the government's discretion and order access to otherwise exempt material. Jurisdiction can also be limited by ministerial certificates in three situations. If a minister certifies that material is exempt, because it falls within an exemption for national security or international relations,[151] is a Cabinet document[152] or is an Executive Council document,[153] the certificate is conclusive. The court can neither inspect the documents or enquire into the justification for giving the certificate.[154] The Minority Report Bill does not fetter the tribunal's jurisdiction. It can review any decision to refuse access.

Both bills allow the tribunal to review decisions on fees.[155] However, the Minority Report Bill would allow the tribunal to order that no fees be payable, that the fee for access be reduced, or that the cost of the appeal procedures be paid by the Commonwealth.[156]

150 Government bill s. 41, MRB s. 14.

151 s. 23.

152 s. 24.

153 s. 25.

154 s. 44(3).

155 Government bill s. 40(1), MRB s. 16.

156 s. 16(4).

On the question of the amount of the fees, the Minority Report Bill is more specific. It states that the cost of search and the cost of copying, can be charged at a "routine" rate. No fees can be charged if the request is for something which should have been indexed but which has not been, and fees can be waived if the material released is of general interest.[157]

The government bill merely states that access is available after fees have been paid. The fees can be set by regulation.[158]

The government bill protects government officers from actions for defamation or breach of confidence in the course of their freedom of information activities[159] and states that no one can be convicted of a criminal offence by authorizing or giving access under this statute.[160] The Minority Report Bill goes further. Not only does it say that no action, either civil or criminal, shall lie against an officer who processed a request, but it also acknowledges that there is a discretion to give otherwise exempt material by making the qualification "... if at the time of disclosure the officer believed in good faith that he was not entitled under this act to refuse to disclose that document."[161]

157 s. 10.

158 s. 16(1)(b).

159 s. 46.

160 s. 47.

161 s. 55.

Both bills require an annual report. The government's bill[162] gives no particulars of the report, whereas the Minority Report Bill[163] lists eighteen items which each department's report must contain.

b) Exemptions

Both bills contain exemptions to the general access rule, but the philosophy of each is different. The government bill strives to preserve ministerial responsibility in its traditional sense, by permitting a minister to make an unreviewable decision as to whether information concerning security, defence, international relations, foreign communications given in confidence,[164] Cabinet proposals, records, and decisions,[165] and Executive Council documents[166] can be withheld.

The Minority Report Bill, on the other hand, embraces the philosophy that the Executive Branch cannot be both advocate and judge in freedom of information questions. Therefore all decisions to refuse information

162 s. 48.

163 s. 51.

164 s. 23.

165 s. 24.

166 s. 25.

are reviewable by the Administrative Appeals Tribunal.[167]

The two bills differ in the amount of discretion they allow. The government bill offers fairly general statements as to what may be withheld: the interpretation is left to those implementing the statute. The Minority Report Bill, on the other hand, offers general statements which are often qualified by a list of illustrative documents which cannot be withheld.

Only with respect to Cabinet records does the Minority Report Bill acknowledge the importance of the doctrine of ministerial responsibility. The Minority Report Bill makes it mandatory for an agency to refuse to disclose records of deliberations, briefings, policies or proposals or consultations concerning Cabinet matters which are less than ten years old.[168] The responsible minister may, however, direct that the material be released. Thus the section clearly specifies that the locus of decision-making about documents which might infringe collective ministerial responsibility must rest with the minister.

Many of the documents exempted by each bill are similar. Each bill exempts security, defence, international relations, and international

167 See discussion infra, p. 172 for the review the Ombudsman might make.

168 s. 29.

communications in confidence;[169] Cabinet documents;[170] internal working documents;[171] law enforcement activities;[172] material exempted by other statutes;[173] material having a substantial adverse effect on legal proceedings;[174] documents concerning trade secrets and business, commercial, or financial undertakings;[175] documents which would constitute a breach of confidence;[176] documents which would have a substantial adverse effect on the national economy.[177] The government bill deals with two other areas which the Minority Report Bill does not. The first is Crown privilege[178] where the Attorney General can give a certificate that the information is exempt because it would be privileged. The certificate is reviewable by the Administrative Appeals Tribunal.[179] The second is an exemption for documents the release of which would be contrary to the public interest

169 Government bill s. 23, MRB s. 27, s. 30.

170 Government bill s. 24, MRB s. 26, 29, 31.

171 Government bill s. 26, MRB s. 31, 35, 36.

172 Government bill s. 27, MRB s. 35, 36.

173 Government bill s. 28, MRB s. 36(o).

174 Government bill s. 31, MRB s. 36(j).

175 Government bill s. 32, MRB s. 32, 36.

176 Government bill s. 34, MRB s. 33.

177 Government bill s. 33, MRB s. 36.

178 Government bill s. 36.

179 Ibid., s. 37(2).

because there would be an adverse effect on the financial, property or staff management practices of an agency, or on the efficient and economical conduct of an agency.[180]

This last exemption is reminiscent of the United States Administrative Procedures Act,[181] wherein the efficient operation of a government agency was considered the paramount interest. Subsequent cases under the Freedom of Information Act[182] made it clear that the purpose of freedom of information is not increased efficiency of government agencies. Probably the most succinct statement is contained in the opinion of the United States Supreme Court in Wellford v. Hardin.[183]

> The Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest.

A similar overriding interest in agency efficiency is not contained in the Minority Report Bill.

180 Ibid., s. 29.

181 1946 60 Stat. 238 as amended and consolidated in 5 U.S.C. 551.

182 5 U.S.C. 552 and see the discussion, infra, chapter III, p. 91 ff.

183 (1971) 444 F. 2d 21 at p. 24.

c) Exemptions Particularly Affecting the Policy-Making Process

i) Cabinet Documents

Cabinet decisions are not exempted by the Minority Report Bill. Indeed, s. 26 imposes a specific requirement that a register be maintained of all Cabinet decisions made after the Act comes into force. This register is to contain details of the decisions, the Cabinet number assigned to each decision, and the date. The register is to be available for inspection and copying. The Minority Report Bill exempts only records of Cabinet deliberations, briefings and consultations, and these are only exempted for ten years.[184] Section 31(2) modifies the exemption further by stating that proposals other than budgetary proposals prepared for presentation to Cabinet and completed after the Act comes into force are not to be withheld.

The government bill excludes the same documents and adds Cabinet decisions and proposals prepared for Cabinet to the exemption.[185] There is no time limit in the government's bill, nor is the government's decision reviewable.

184 s. 29.

185 s. 24.

It is trite to say that Cabinet decisions are the end product of government policy making. While the Cabinet consultations, deliberations, and briefings may be withheld to follow the notion of preserving collective ministerial responsibility, Cabinet decisions are the very things for which ministers are to be responsible to Parliament. If, as under the government's bill, the decisions may never be known, then the bill undermines the basic principle of ministerial responsibility which is the cornerstone of a Westminster system of government.

ii) Other Statutes

Both bills contain exemptions for information the disclosure of which is prohibited by other statutes.

The government's bill creates a more substantial exemption in this area, both because it defines the concept of exempting statutes broadly to include any which either prohibit or restrict disclosure, and because it does not require a listing of all statutes, regulations and ordinances which are included in the exemption.[186] The Interdepartmental Committee Report, 1976[187] states that freedom of information legislation would not constitute "authorization" to grant information. Thus it might not override the general secrecy provision in section 70 of the Crimes

186 s. 28.

187 Para. 23.5.

Act.[188] Furthermore, the Interdepartmental Committee suggested that freedom of information legislation would not affect subsequent regulations and other subordinate legislation. Subsequent legislation which restricted access could quickly undermine the spirit of a freedom of information statute.

The Minority Report Bill exempts information which other statutes require to be withheld;[189] however, all of those statutes and other rules are specified in a schedule attached to the bill. The schedule sets out the specific sections in about 40 statutes which fall within the exemption.

These statutes can have a substantial adverse effect on access to information during the policy-making process. They range from considerations of personal privacy (Census and Statistics Act,[190] Health Insurance Act,[191]) to general concerns for preserving administrative secrecy (Home Savings Grant Act,[192] Science and Industry Research Act.[193]) A detailed review of these statutes has not been undertaken. Comments concerning their effect on the policy-making process are therefore limited to the general ones above.

188 See infra, p. 176.

189 s. 26(o).

190 Act No. 15 of 1905.

191 Act No. 42 of 1974.

192 Act No. 51 of 1964.

193 Act No. 13 of 1949.

iii) Breach of Confidence

Concerning undertakings of confidentiality, the Minority Report Bill again attempts to reduce the scope for withholding. The government's bill allows withholding if disclosure would "constitute a breach of confidence"[194] but the Minority Report Bill only allows withholding if an agency would be entitled to withhold the information if the agency had generated it, or if there were a justifiable fear that the information would no longer be supplied.[195] In addition, the Minority Report Bill points out that the exemption is not to apply to information supplied by another agency or to trade secrets or commercial and financial information from a commercial or financial institution.[196]

The effect of the government's proposal may be substantial. Consultants' reports are often submitted on a confidential basis,[197] as is much of the information on which government bases its decisions. If the government asked submitters to request confidentiality, a large mass of mainly factual information would be exempted. The Minority Report Bill narrows the confidentiality exemption by balancing two possible harms against the public interest in disclosure.

194 s. 34.

195 s. 33.

196 Ibid.

197 s. 26 states that test and survey results are not included in the exemption.

iv) National Economic Interests

An area of increasing importance in the policy-making process is that of economic choices for the future. In this area, the government bill provides a broad exemption in section 33. It sets out a harms test: if release would be contrary to the public interest because disclosure would have "a substantially adverse effect on the national economy," then information can be withheld. As is its consistent practice, the Minority Report Bill narrows the scope by adding both a time element and a list of fourteen kinds of information the premature release of which might have a substantially adverse effect.[198] Among the fourteen are documents concerning changes in interest or tariff rates, documents concerning changes in currency and the like. The material can only be withheld if its premature disclosure would do harm.

v) Internal Working Documents

The exemption which most affects the policy-making process is the one for internal working documents. Any desire for participation during the process can only be satisfied with information at each step. As is pointed out elsewhere,[199] by the time a policy is introduced

198 s. 36.

199 See infra, p. 197.

in Parliament the opportunity for meaningful participation is all but foreclosed. It is otherwise in both the United States and Sweden.[200] Any Australian exemption for internal working documents can therefore have a much more significant effect on the policy-making process than a similar exemption in either Sweden or the United States.

The government bill[201] states that factual material may not be withheld. The Minority Report Bill contains the same clear statement that facts, whether contained in internal working documents or not, must be made accessible.[202]

Both bills seek to protect the deliberative process. The government bill sets out two tests which must be met before internal working documents may be withheld. The two tests are whether release of the document

> would disclose ... opinion, advice or recommendation ... consultation or deliberation ... in the course of or for the purpose of the deliberative processes involved in the functions of an agency or minister or of the government of the Commonwealth

and whether release would be contrary to the public interest.[203]

200 See infra, Chapter II and III, for a discussion of how each system provides opportunities for participation in the policy-making process.

201 s. 26(3).

202 s. 31(2)(a).

203 s. 26.

The government bill excludes three things from the exemption: secret law,[204] (also contained in the Minority Report Bill,)[205] reports and opinions of scientific and technical experts,[206] and records or formal statements of reasons for final decisions given during adjudicative functions. If the government withholds under section 26, then it must notify the requestor of the public interest ground on which the refusal is based.

The Minority Report Bill contains a different test, although its general statement of what may be withheld is very similar. A document which "contains an opinion, advice or recommendation ... submitted for consideration leading to the making of a decision or the formulation of a policy"[207] may be withheld.

This broad statement is modified by a list of sixteen kinds of information which may not be withheld unless "conditions exist at that time under which the making of a decision or the implementation of a policy would be unreasonably impeded by disclosure of that document."[208] The Minority Report Bill uses timing and impairment of government

204 s. 26(2).

205 s. 31(2)(o).

206 s. 26(4)(a).

207 s. 31.

208 Ibid.

functions as tests, rather than referring to a general public interest. In any event, internal working documents which are more than ten years old cannot be withheld.

The kinds of information which may not be withheld unless they meet those two tests are:

- factual material
- statistical surveys
- valuers' reports
- environmental impact statements
- test reports
- performance or efficiency reports
- feasibility and technical studies
- field research results
- certain bureau reports such as those of the Bureau of Agricultural Economics, the Bureau of Transport Economics, and similar investigative bodies within agencies
- final plans or proposals for reorganizing agency functions or establishing new programs
- interdepartmental committee task force or similar reports
- reports of inquiries undertaken by committees, councils or other bodies attached to agencies
- final proposals for subordinate legislation
- completed proposals or submissions for presentation to Cabinet or to Cabinet committees (so long as they have been prepared after the Act comes into force)
- secret law
- final decisions concerning the exercise of discretionary powers.

C. The Policy-Making Process

1. Basic Outline

Although ideas for policies can come from anywhere (for example, from the civil service, from special interest groups, from the party caucus, from Cabinet ministers, or from editorial campaigns), policy making is concentrated in the Cabinet and the public service. Although royal commissions sometimes investigate certain issues, their use is by no means extensive. There are no requirements for public consultation or for releasing any information before draft legislation is introduced.

> Although laws are processed through parliament, making [laws] is effectively carried out before proposals reach the parliament. Legislation normally originates with the public service or with the Cabinet. 209,210

Before getting to Cabinet, a policy proposal will have worked its way through the departmental hierarchy, perhaps with an interdepartmental committee or a royal commission inquiring into the subject. Both the

209 Solomon, p. 25.

210 "The principal responsibility for choosing and shaping policy priorities lies elsewhere [than the legislature] conspicuously in the hands of ministers and heads of government departments." Albinski, p. 289.

minister's staff[211] and the Cabinet secretariat[212] review all proposals before Cabinet consideration. The secretariat is credited with being a force for secrecy.

> The growth of the Cabinet secretariat is an important contributing factor to the mania for secrecy ... governments have been reluctant to give details about the existence, membership, and functions of Cabinet committees. 213

Once a proposal reaches Cabinet it is referred to the Cabinet committee on legislation, which reviews all bills before they are introduced. After committee review, draft legislation is sent to the caucus for discussion. In some cases, the caucus will have discussed the measure extensively before legislation has been drafted; in others, the Cabinet approved draft may be the first draft that the caucus sees.

Finally, a bill is introduced in Parliament. Its introduction may be the first public announcement in the policy-making process. The bill may be referred to a Parliamentary committee. Unlike the United States,

211 Each minister is provided with a staff which although governed by the public service act is also subject to special conditions. Most importantly, they do not have the same tenure in their jobs as do regular civil servants and there is no merit competition for the jobs. Ministers can appoint whom they like. They are used to provide policy and political information and for helping their ministers elsewhere particularly at party committee meetings: Solomon, p. 143.

212 Although first discussed in 1925, the idea was originally resisted on the grounds that letting officials into Cabinet meetings would be a breach of Cabinet secrecy. The secretariat was finally established in 1949.

213 Encel, p. 217.

the legislative committee process is essentially passive: the committees do not initiate investigations or hold hearings, but wait for bills to be referred. Not all bills are referred.[214] The governing party or coalition controls the committee, and thus a majority of members are already committed to the proposal. Government members have had an opportunity to examine a proposal in their caucus meetings. They seldom have an interest in a committee's undertaking a thorough-going inquiry into a subject on which they have already made up their minds. In practice, at least 90 percent of all bills introduced by the government are passed in the form approved by the Cabinet Committee on Legislation.[215]

A legislative committee is expected to report on any bill it considers. Its report is tabled in parliament. The bill is then read a third time and a vote taken. When a bill has been passed by both chambers, it is sent to the Governor General for signature and proclamation.

2. Freedom of Information and the Policy-Making Process

At present the policy-making process is a closed system. It does not have the various windows through which the public can get information

214 See p. 163 infra for 1971 statistics.

215 Solomon, p. 25.

which both the Swedish system (Freedom of the Press Act, remiss, royal commissions) of the U.S. system (Freedom of Information Act, Congressional hearings, sunshine law) do. The system is a closed system because it is so tightly controlled by the governing party.

Freedom of information legislation may thus substantially affect the policy-making process because it may become the only formal mechanism for the public to obtain information. As has been noted elsewhere, at present public information is available so late in the process that access legislation, which can provide information early in the process, may lead not only to requests for such information, but also to demands for participation. In both Sweden and the United States, public information about policy making is available so much earlier in the process -- and from many more sources -- that the transition to open government in those countries has been relatively tranquil. Access legislation may have increased equality of participation in those countries, but this has been within a context of existing participatory structures. In Australia, there are few, if any, significant participatory structures. Access to information will, as it did in the United States, provide information which can be used to enhance the quality of participation. But, because there are few participatory mechanisms, it is likely that the public, armed with information made available under access legislation, will demand real opportunities to be heard long before the point at which a proposed policy is considered by parliamentary committee. It will not be enough that the government is telling people what is going on; the government may have to be prepared

to be told what should be going on.[216] At present, few concrete statements can be made about how either bill will affect the Australian policy-making process. Each permits many discretionary decisions. The government's bill lacks specificity and is concerned to preserve exclusive ministerial discretion in high policy areas such as national defence, international relations, and Cabinet records, including decisions. Coupled with the long time period allowed for replies (sixty days) and the overriding concern for the convenience of government departments, it is predicted that the legislation's effect on the policy-making process can be kept to a minimum by conservative implementation.

The Minority Report Bill, on the other hand, tries to limit discretion. Its short time limits (10 to 20 days), its creation of a register of Cabinet's decisions, its specifics of which "internal working documents" must not be withheld, and its overriding concern that information only be withheld if its release will have a substantially adverse effect on a recognized commonwealth interest all suggest that an enormous amount of information could be released at an early stage in the policy-making process. To the extent that the Minority Report Bill would limit discretion, one can predict that it would substantially affect the policy-making process by providing the information necessary early enough for significant participation.[217]

216 There will be a duty "to tell and be told" as John McMillan puts it in his article on freedom of information, op.cit.

217 Both bills would substantially aid in monitoring government administration once policies have been decided and are being implemented.

Whether these predictions are correct remains to be seen: it is not yet known whether the government has accepted any of the recommendations proposed by the Senate committee which examined the bill. Information on the practical details of administration and exercise of discretion, which is available for both Sweden and the United States, has not yet been created in Australia. Thus, while the Australian experience provides a useful framework within which Ontario's similarities and differences can be considered, it does not provide the guidance of day-to-day-administrative decisions. One must continue to watch with interest the choices Australia makes.

D. Conclusion

The study of the Australian system shows that complexities of modern government necessitate an evolution in the uses of ministerial responsibility and Cabinet solidarity as reasons to exclude information from the public. In Australia, both doctrines are often ignored, with no apparent adverse consequences.

An equally important reason for an evolution in the two doctrines is the fact that complex modern government means that ministers are simply not capable of assuming the kind of collective and individual responsibility they did in simpler times. At present, although the focus of responsibility is still on the ministers, the locus is on those with the most information, namely the civil servants. Civil servants,

however well-intentioned, cannot take adequate responsibility for the administration of government because they are not accountable to anyone but their ministers. Freedom of information legislation can be regarded as a step in the evolution from a closed system to one which revitalizes the concepts of responsibility and accountability by permitting the public oversight and participation that democratic principles demand.

CHAPTER V

CONCLUSION

A. The Evolution of Access to Information

There are many parallels to be drawn among the countries studied. Each has a democratic form of government, and, although the institutional structure implementing democratic principles differs from one country to the next, each has followed an evolutionary process of developing mechanisms providing greater public access to government information.

The basic essentials of democratic government in each country provided some measure of public access to government information by requiring an open legislative process in which elected representatives were to scrutinize government actions on the public's behalf. The amount and kind of information available to the public therefore depended on the legislature's ability to obtain information for its scrutiny of the government.

In Sweden, a need for public scrutiny independent of the legislature was acknowledged in 1766 after a change in government. The previous government believed that there was a need to control information, particularly if it was unfavourable to the government. After a long

period of censorship, that government was ousted. Abolishing censorship and entrenching the principles of open government was a central reform of the new order. Each communication sent or received by a government entity was to be made publicly accessible. Thus, not only was censorship abolished, but a close day-to-day scrutiny of government operations was also established.

In the United States, scrutiny of government operations was established by means of constitutional provisions for separation of powers and checks and balances. The legislature could call for information from the executive branch, although in some circumstances (particularly when the information dealt with a matter exclusively assigned to the executive branch by the Constitution) the information might be refused under a claim of executive privilege.

In the United States, the public's right to scrutinize government activities independent of their Congressional representatives was not contained in the Constitution. A qualified public right to scrutinize was acknowledged in the Administrative Procedures Act of 1946, but it was balanced against the government's right to carry on its business efficiently. Information did not have to be made available if the requestor was not properly concerned with the matter, or if providing the information would interfere with the efficient operation of the agency.

In the early 1900s, public interest in the affairs of government

intensified. In particular, the right of interested citizens to engage in direct scrutiny of public officials' conduct achieved greater recognition. As efficient government operations were, after all, undertaken in the name of and for the citizens, their efficiency could not be said to be more important than the public's right to know. It was also obvious that the rapid growth of governmental institutions and the range of government programs and regulatory activities meant that there was too much for Congress alone to oversee effectively on the citizens' behalf.

The balancing of interests shifted from the need to know versus government efficiency to a right to know versus a right to have the government keep confidential that which might cause harm to the general interests of all citizens if released. The principle that the public ought to be able to participate in the formulation of public policy and the attendant need for greater public access to government information was thus asserted.[1]

In Australia, the public right to scrutinize government has always been restricted by traditions such as Cabinet solidarity or collectivity and

1 The principle has been stated as: "Any issue for which there is a relevant public of people affected ought to be decided according to public mechanisms determined in advance and to which the relevant public has the right of access." The right of access means "a citizenry ought to have access to the deliberations, records and commitments of its government." Robert C. Neville, The Cosmology of Freedom (New Haven and London: Yale University Press, 1974) pp. 356, 354.

ministerial responsibility, which were adopted with the British form of government. As originally propounded, Cabinet collectivity meant that ministers took both joint and several responsibility for each decision even if they disagreed during the decision-making process. Disagreements were to be confined to the Cabinet room and not made public. Ministerial responsibility originally meant that ministers were responsible to the populace only at election time and to all the other elected members because they assumed the more general and far-reaching task of being ministers.

The original notion of ministerial responsibility was all-encompassing. The minister was to be responsible for each and every act of his or her department, including providing or withholding information, and was expected to resign if things went wrong. As in the United States, the growth in the size and complexity of government institutions made the original ideal impossible to follow. The original concept relied on the legislature getting information by having ministers answer members' questions in the House and Senate. As the administration of public affairs became more complex, ministers could not be expected to know the answers. Indeed, they often refused to answer even if they did know, on the ground that revealing the information asked for would be a breach of ministerial responsibility. "Ministerial responsibility" meant responsibility to the government of the day. There was thus a breakdown in the legislature's ability to obtain information with which to scrutinize and control the government. Because public access to information depended on legislative access, there was also a breakdown

in the usefulness of the doctrine of ministerial responsibility as a mechanism for ensuring the political accountability of ministers.

By the early 1970s, Australians had evidently developed concerns about the prevailing levels of government secrecy. A new government which had campaigned on the promise of open government was elected. A broad public debate on freedom of information began. It has not as yet been resolved.

B. Methods of Access: The Legislative Process

In the three countries studied, the end product of the policy-making process is legislation. Bills are introduced into the legislature and then may be referred to committees where they are studied, perhaps modified, and returned for a final vote. In Australia, committees are often not used; in the United States and in Sweden, bills are always referred to committee.

In all three countries, legislative sessions are open, so proposed legislation is available to the public as soon as it is introduced. The committee process is open in all countries except Sweden, and citizens can follow the debate at this stage. Final reports from legislative committees are made public in all three countries. The vote on the final measure is recorded and made public.

There are, however, very substantial differences in the quality and amount of information which is available during the legislative process. In Australia, the majority party or coalition can control the legislative process and ensure that only those measures of which the government approves will be passed. Substantive change during the committee process is unusual. Although a member of the public can participate by testifying at a committee hearing, it is effectively too late in the process to influence decision-making. Committee members themselves have difficulty performing an effective role. They are rarely experts on the subject matter, and they are rarely given enough information to make an informed and knowledgeable judgment about a measure. There is only a modest parliamentary research service available to members. The committees employ too few permanent staff members to permit a build-up of expertise which could be used to advise on the substantive matters contained in proposed bills. The quality of discussion and questioning in committee reflects these deficiencies.

A very different situation prevails in the United States. Neither the executive nor the Cabinet controls the committees. Even when the majority party in each chamber is the same as the president's party, this fact does not ensure passage of the administration's legislation. The doctrine of separation of powers allows even members of the president's political party to feel perfectly free to introduce conflicting legislation, to disagree with administration policy, or to introduce their own special interest legislation designed to gain votes in their constituencies. Congressional committees in the United States

have permanent staffs. There is keen competition for these positions, thus allowing the selection of highly qualified staff members. The staff works for both the majority and the minority party members, although nominally under the direction of the chair of the committee. They prepare for the negotiation of clauses among various members of Congress, they gather intelligence as to what compromises are acceptable, they brief members and spend as much time as necessary making sure that even the most complicated measures are clearly understood by each interested member of the committee. The staff prepares penetrating questions for the members to ask witnesses. Witnesses are those persons who believe themselves to be specially affected, and those who are leading experts in their fields. Their testimony is often well-researched and influential. There are four well-staffed research services available to members of Congress. Each produces information and analyses of very high quality. The rich supply of information and expertise to the committees, coupled with the importance of their political role, ensures that the committee deliberations contribute significantly to the policy-making process.

In Sweden the committee stage was designed as a consensus-building mechanism. Committees were to work in a non-partisan way, seeking compromise. Thus the committees were closed to the public and ministers were forbidden to sit on them. Party discipline and government control were not to reach committees. In the modern era, however, most of the compromises and consensus building takes place before a measure reaches the committee. The Swedish legislative process is analogous to the

Australian system insofar as bills are rarely changed in committee; little new information is produced in committee and the committee stage is at the end of the policy-making process.

The crucial feature of the Swedish system which makes for so much more accountability than in the Australian system is that the full range of information which is available at the United States committee stage is available in Sweden long before that stage is reached. Although little new information is generated in Swedish parliamentary committees, there is so much existing background information, much of it generated by a process of broad consultation with interested groups and individuals, that more information is not necessary. In Australia, on the other hand, consultation is not required and background information may never be made available. If it is, it is made available only upon the exercise of ministerial discretion.

In Sweden, all major policy initiatives and most minor ones go to a royal commission for examination. After all points of view are canvassed, a report is prepared. It is submitted to a minister and made public at the same time. If the minister wants to proceed, he or she is under a mandatory duty to circulate the report widely, to invite opinion and comments, and to take these into account when preparing a recommendation to Cabinet about what legislation if any, should be introduced. Wide public participation takes place at this early stage of the policy-making process. It can have a substantial effect, since it can be based on the thoroughly researched report of the royal

commission and on the submissions of others, which are also made public as soon as they are received by the minister.

In sum, then, the United States congressional committee procedure and the Swedish royal commission-consultation procedures provide excellent substantive information about proposed policies at a time in policy making when participation in the process can be meaningful. The Australian committee system, which is the only formal arena for public participation and information gathering, is ineffective by comparison.

C. Methods of Access: Statutes

There is no statute in Australia which grants access to the Commonwealth's information. The two bills which have been proposed have been discussed in Chapter IV. Legislation in both Sweden and the United States grants a broad general right of access for any person to any document, with some exceptions, regardless of physical manifestation. Requests must reasonably describe the information wanted; there are time limits for government replies to requests and there are provisions for internal and external independent appeals.

In both Sweden and the United States, a great deal more than the minimum of factual material is available under the statutes. The Swedish rule requires that any document which is received, sent or completed by a government entity be made publicly accessible (with some exceptions

found in the Secrecy Act) as soon as it is received, sent or completed by the entity. Some government entities provide reading rooms where the day's incoming and outgoing documents are displayed for inspection. The American rule is that every document is accessible (with some exceptions found in the Freedom of Information Act) upon request. The Swedish rule ties access to each step in the process of government administration and decision making; while the American rule makes no mention of any ongoing process, it makes documents available when a request is received. In Sweden, a decision on access is made upon receipt or completion of each document; in the United States, no decision need be made unless a request is received.

In the United States, the legislation contains a broad exemption ((b)(5)) which can be used to protect internal advice, proposals and the deliberative process. Court interpretations have narrowed the scope of this exemption to protect only deliberative material with subjective content. As outlined in Chapter III, post-decisional information, information affecting a member of the public, factual information, opinions of experts, documents incorporated by reference, documents containing decisions, documents which have been adopted and documents not otherwise exempt which have been made available to any one person must be made accessible following judicial interpretations of exemption ((b)(5)).

All three countries studied have legislation which requires at least some information to be kept secret. In Australia, the Crimes Act

requires each civil servant to keep all information which comes to his or her attention in the course of employment secret.

In Sweden, the Secrecy Act is a very specific and detailed statute which not only sets out precisely the kinds of information which may be protected, but also sets out the time periods for which each may be withheld. The statute is a permissive one, and grants an overriding discretion to ministers to release information if no injury will result from that release.

In the United States, a number of statutes contain provisions for keeping information confidential, and an executive order on classification and withholding of information relating to defence and foreign policy has been promulgated. Both these devices are incorporated in exemptions ((b)(1) and (b)(3)) of the Freedom of Information Act. A certain amount of specificity concerning what may be withheld is given in the executive classification order and the 1976 amendment to exemption (b)(3) but there is nowhere near the precision of the Swedish Secrecy Act. In the United States, judicial interpretations of the exemptions continue the process of restricting, modifying and making more precise the meaning and extent of permitted secrecy.

D. Accountability and Participation

The introduction to this study pointed out that while access to factual

information may be sufficient for the public to hold the government accountable for administration of programs and policies, it does not provide enough information to scrutinize effectively the process of formulating public policy. Access to proposals, competing options and the reasoning behind each is also desirable for the purpose of rendering government policy makers accountable not only to the public but also to the legislature. Under current practice, Australia has no mechanism for accountability in these terms. Because information is released only at the discretion of ministers, the government can choose with whom to share it as deliberations progress. The wider public has no knowledge of the deliberative process. Just as the public cannot, in the absence of information, hold the government accountable or participate in policy making, so too is the legislature impeded in its functions of holding the government accountable and of participating in a meaningful way in the debates and considerations of a proposed measure. Although the legislature itself has greater rights to information than does the public, the legislature is normally controlled by the government of the day. A member of the opposition does have the opportunity to press the government with questions, but the government may simply refuse to answer. Refusals are often justified on the basis of ministerial responsibility and Cabinet solidarity. Sweden, on the other hand, whose similar Cabinet system of government includes the doctrines of ministerial responsibility and Cabinet solidarity, provides a model of both accountability and participation. The release of nearly all information directly to the public and the duty to consult and to take the results into account are seen as enhancing ministerial responsibility

and Cabinet solidarity by providing the widest possible basis of information on which to make policy choices. Information is made available at each step of the deliberative process, thus increasing the possibility for effective scrutiny and meaningful participation. Moreover, there is an opportunity to observe the contributions of others, since each submission is made accessible to all as soon as it is received by a government institution or minister.

In the United States, Congress is not just a reviewer of policy measures introduced by the government; it is an initiator. It follows that a major part of the deliberative process is open to public scrutiny because the constitution requires Congress to deliberate in open session and to make its minutes and documents part of the public record.

The Administration does not control the committees, and therefore amendments which are unfavourable to the Administration's position may well be approved by the committee. The excellence of committee staff, the expertise among committee members, and the comprehensive legislative services indicate that information provided and generated at the committee stage becomes the substance of the measure being considered. In addition, committee hearings take place early in the policy-making process at a time when all possible choices are available. There is, therefore, an excellent opportunity for meaningful participation.

E. The Impact of Access Legislation

Freedom of information legislation may have a greater effect on the policy-making process in Australia than it has had in the United States and Sweden, because it may well be the only mechanism in Australia for getting information early enough in the process to enhance the prospects for greater public and legislative accountability and participation.

In the United States and Sweden, there are so many mechanisms which provide for openness even in the absence of access legislation, that, although such a statute is a welcome addition to the tools which can be used to get information from the government, it is by no means the cornerstone of access to information relating to the policy-making process. Indeed, in both Sweden and the United States, the access legislation contains permissive exemptions for information which would disclose advice given to the executive by civil servants during the deliberative process.

In Australia, both proposed bills contain exemptions for deliberative material of this kind, although the Minority Report Bill strictly limits the scope for withholding under its exemption. The government bill contains much broader protection for deliberative material.

F. The Lessons for Ontario

What lessons can be learned from the evolution of open government in Sweden, the United States and Australia?

Australia's system of government is the closest to that in Ontario. The Australian experience can provide useful insights as a result of its thorough debate of the issues. Much attention has been directed to the problem of attempting to preserve the constitutional traditions of Cabinet solidarity and ministerial responsibility while at the same time confining the government's discretion to resist disclosure so as to ensure as broad a right of public access as possible. The possible solutions to this difficulty are best illustrated in the provisions of the Minority Report Bill and in the Senate Report. Both documents express the view that these constitutional conventions provide no serious impediment to the adoption of a freedom of information law.[2]

2 Of the Ontario practice of ministerial responsibility, F.F. Schindeler says the following:

> Indeed, when the Government assumes responsibility for its activities without allowing full and impartial investigations of those activities it is really ensuring that it will never in fact be held responsible for them. Thus, in the given situation, the principle of ministerial responsibility has little usefulness as a tool for checking the powers of the executive. ... Giving lip service to such myths as "Ministerial responsibility" may have some salutary psychological effect on the ministers and civil servants ... but for serious commentators on the Ontario scene to use such terms with the intent of describing actualities is at best anachronistic and at worst entirely misleading.
>
> F.F. Schindeler, Responsible Government in Ontario (Toronto: University of Toronto Press, 1969) pp. 268, 269.

The Swedish experience illustrates that access to information during the policy-making process is not inconsistent with a Cabinet system of government. It does not interfere with Cabinet collectivity or ministerial responsibility in Sweden. Further, because the Swedish statute makes information available whenever received or sent by a government authority, it requires, for its effectiveness, that all civil servants be constantly aware of the access provisions. This ensures that openness becomes a habit of thought among the civil servants who receive, generate and dispense information. S.V. Anderson has referred to this habit as the genius of the Swedish system and the key to its success.[3] To attain a similar success for an Ontario statute, efforts such as training programs, incentives to comply, or sanctions for non-compliance should be seriously considered.

The United States experience is particularly useful for Ontario because the close proximity of that country affects the expectations of Ontario residents. The number of American cases concerning access to deliberative material indicates the acute difficulty of balancing the interests in participation and accountability on the one hand with the protection of the deliberative process on the other. The American cases trace an evolution towards openness with the minimum secrecy necessary to protect the deliberative process. It is particularly useful to notice that many of the arguments advanced for withholding deliberative material now appear to have been ill-founded. Fears of harm to the deliberative process, such as an inability to get certain kinds of information in

3 S.V. Anderson, "Public Access to Government Files in Sweden," op. cit.

the future, a lessening of the candour with which civil servants give their advice, importunate demands for special consideration, and adverse effects if civil servants did not preserve their anonymity are no longer considered by the government to be acceptable reasons for withholding information. To withhold information an agency must now determine that a real prejudice to a legitimate government interest will result; otherwise, information must be made available.

This is not to suggest that there are no problem areas in access to information during the American policy-making process. The majority of such problems are however, in the area of national defence and foreign policy. Efforts to strike a balance between information which is necessary for accountability in the mistrustful post-Watergate era, and the need to protect information which has habitually been tied to secrecy as being in the crucial interests of the state, have been difficult. In Canada, these are areas of federal jurisdiction and should not give rise to difficulty in the context of a provincial freedom of information law.

The number of judicial interpretations and legislative hearings which have been necessary to refine those provisions in the FOIA which impinge on policy making have been a very expensive method of clarification. The amount of litigation indicates that an act drafted as simply and as concisely as the Freedom of Information Act needs considerable interpretation to be made workable. A more precise and comprehensive enactment could avoid a similar spate of litigation in Ontario. In Sweden, where the statute concerning information which may be withheld

is extremely precise and comprehensive, there has been no comparable amount of litigation. In Australia, the particularity of the Minority Report Bill commends itself by incorporating a good deal of the legislative and judicial history of the Freedom of Information Act. At the least, those who design a scheme for Ontario should consider the questions raised by the American cases and Congressional hearings, and should study the Australian Minority Report Bill.

In sum, access to information relating to the policy-making process is necessary and desirable for the purpose of enhancing the accountability of government and meaningful participation in the policy-making process by parties other than the government of the day. Ontario legislation should, therefore, begin with the premise that information should only be withheld if there is a real harm in releasing it. To start with this premise is to be the beneficiary of the long history of freedom of information legislation in Sweden, and the shorter but more intense fifteen-year history in the United States. To start at a point earlier in the evolution towards open government would be an unnecessary and wasteful exercise in reinventing wheels already in successful use elsewhere.

COMMISSION RESEARCH PUBLICATIONS

The following list of research publications prepared for the Commission may be obtained at the Ontario Government Bookstore in Toronto, or by mail through the Publications Centre, 880 Bay Street, 5th Floor, Toronto, Ontario M7A 1N8.

Prices are indicated below. Orders placed through the Publications Centre should be accompanied by a cheque or money order made payable to the "Treasurer of Ontario."

Further titles will be listed in the Ontario Government Publications Monthly Checklist and in future Commission newsletters.

The Freedom of Information Issue: A Political Analysis
Research Publication 1
by Prof. Donald V. Smiley, York University $2.00

Freedom of Information and Ministerial Responsibility
Research Publication 2
by Prof. Kenneth Kernaghan, Brock University $2.00

Public Access to Government Documents: A Comparative Perspective
Research Publication 3
by Prof. Donald C. Rowat, Carleton University $3.00

Information Access and the Workmen's Compensation Board
Research Publication 4
by Prof. Terence Ison, Queen's University $5.00

Research and Statistical Uses of Ontario Government Personal Data
Research Publication 5
by Prof. David H. Flaherty, University of Western Ontario $2.00

Access to Information: Ontario Government Administrative Operations
Research Publication 6
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Freedom of Information in Local Government in Ontario
Research Publication 7
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Research Publication 8
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Rule-Making Hearings: A General Statute for Ontario?
Research Publication 9
by Prof. David J. Mullan, Queen's University $2.00

Freedom of Information and the Administrative Process
Research Publication 10
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Research Publication 11
by Timothy G. Brown $2.00

Freedom of Information and Individual Privacy: A Selective Bibliography
Research Publication 12
by Laurel Murdoch and Jane Hillard,
with the assistance of Judith Smith $2.00

Freedom of Information and the Policy-Making Process in Ontario
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Research Publication 15
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Research Publication 16
by Heather Mitchell $2.00